Transportation has characterized as "free miles" and enjoy corresponding "tax savings." Trial Ex. 23. The obvious effect of the flat tax therefore is to reduce the effective per-mile tax rate on trucks whose mileage in Oregon exceeds the break-even point. App., *infra*, 26a-27a.[1]

Although use of the flat-tax option purportedly is open to all carriers of the favored commodities, the comparatively high break-even mileage set by the Oregon Legislature (calculated by looking to mileage traveled by the average truck that operates *only* in Oregon) means that it almost *never* will be feasible for carriers that operate their trucks in interstate commerce to elect the flat tax. That is especially so because a carrier may choose between the flat-tax and weight-mile options only once a year, and a carrier that elects the flat-tax approach must do so for *all* the trucks in its fleet that carry the specified commodity in Oregon. ORS 825.480(2).

This reality is confirmed by empirical evidence. According to the best data available for the most recent tax period prior to trial, only approximately 0.22 per cent of all out-of-state based carriers whose trucks used Oregon highways paid their highway tax under the flat-tax option, while approximately 11 per cent of all Oregon-based carriers did – making Oregon carriers *fifty* times more likely than their out-of-state competitors to choose the flat tax. ER 8.[2] Similarly, out-of-

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[1] In fact, the Oregon Department of Transportation has calculated and published break-even numbers for flat-tax commodity carriers. See ER 16, Ex. 22.

[2] Only carriers transporting the favored commodities are eligible to pay the flat fee; that is why "most carriers operating in Oregon, both those that operate primarily interstate and those that operate primarily intrastate, pay the weight-mile tax." App., *infra*, 32a. But among similarly situated carriers eligible to opt for the flat tax, the decision to do so is made overwhelmingly by intrastate carriers.

state based carriers made up only 3.5 per cent (38 out of 1094) of the carriers electing to pay the flat tax, paid only two per cent ($187,060 out of $9,266,743) of taxes collected under the flat tax, operated only about two per cent (2,185,101 out of 105,021,120) of the total miles reported by trucks paying the flat tax, and operated only about three per cent (129 out of 4401) of the total trucks whose highway tax was paid under the flat-tax option. ER 9-12, 28.[3]

Data also confirm the obvious in a related way: flat-tax taxpayers that travel a high volume of miles in Oregon obtain substantial savings by doing so, underpaying in comparison with what they would have paid – and what their competitors *did* pay – under the weight-mile system. According to the best data available for the most recent tax year at the time of trial, sand and gravel carriers that elected the flat-tax option in the aggregate paid $276,535.86 less than they would have paid under the weight-mile option, while flat-tax log carriers paid $1,164,585.86 less. App., *infra*, 6a, 26a.[4]

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[3] Even these statistics overstate the extent to which out-of-state carriers benefit from the flat tax. Out-of-state based carriers paying the flat tax are very different from other out-of-state carriers that use Oregon's highways. In 2000, almost sixty per cent of the trucks operated in Oregon by out-of-state carriers paying the flat tax (75 out of 129) were base-registered *in Oregon* (ER 12, Stip. ¶ 6 (cc)); in contrast, out-of-state based carriers paying the Oregon weight-mile tax based virtually all of their 245,982 vehicles outside the State. Many out-of-state based carriers electing to pay the flat tax thus essentially assume the characteristics of Oregon companies.

[4] Data from prior years showed a similar advantage for flat-tax carriers of sand and gravel and logs. See ER 25. In contrast, the flat tax for trucks carrying wood chips was set at a level that closely approximated the aggregate amount paid by trucks subject to the weight-mile tax; in the most recent tax year for which data were available at the time of trial, flat-tax wood chip carriers as a

Thus, as the court of appeals explained, "[t]he structure of the taxing system makes it probable that carriers that choose the flat fee options will, as a group, pay less than if they paid the weight-mile tax," as "[o]nly a carrier that expects to save money will elect to choose to pay a flat fee." App., *infra*, 26a. And "the primary benefit that the [flat-tax] options provide is to reduce the total tax bill of a carrier whose trucks operate more miles than the presumed average that the legislature used to calculate the amount of the flat fee." *Ibid.* These savings have substantial competitive implications for the (largely in-state) companies that benefit from the flat tax. "For sand and gravel carriers, the underpayments are equivalent to 1.34 cents per mile, while for log carriers they are equivalent to 1.9 cents per mile. For purposes of comparison, the average profit margin in the trucking industry is 3 cents per mile." *Ibid.*

2. Petitioners, interstate truckers and their trade association, brought this action in Oregon state court to challenge the constitutionality of the flat tax under the Commerce Clause. Invoking the principles enunciated in *Scheiner* and related decisions, petitioners contended that the flat tax lacks internal consistency: if all states employed a similar highway tax regime, interstate truckers would be placed at a structural disadvantage because it always would be cheaper for high-mileage vehicles to confine their operation to a single state than to travel between states. Petitioners also maintained that the tax necessarily discriminates against interstate commerce in its practical effect because high-mileage interstate carriers inevitably will pay Oregon's highway tax at a higher effective per-mile rate than do identical carriers whose vehicles operate only in Oregon. The trial court recognized that flat-tax sand and gravel and log carriers do pay their highway tax

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group paid $27,315.75 more than they would have paid under the weight-mile tax. App., *infra*, 26a.

at a lower effective per-mile rate than carriers electing the weight-mile tax, and also acknowledged that most flat-tax carriers are based in Oregon (App., *infra*, 67a-68a), but nevertheless upheld the flat tax. *Id.* at 40a-78a.

The Oregon Court of Appeals reversed. App., *infra*, 23a-39a. Relying on *Scheiner* and this Court's other Commerce Clause precedents, the court of appeals began by noting that "'[i]nternal consistency' appears to be the primary test for determining whether a tax discriminates against interstate commerce in effect. For determining both fair apportionment and discrimination in effect, the issue is whether the tax, if universally applied, would impermissibly interfere with free trade." *Id.* at 30a. The court also observed that, although the flat tax is optional and applies to only a limited number of commodities, "those facts may limit the discriminatory effect of the flat fees, [but] they do not necessarily make them constitutional. It remains possible that the very act of choosing the flat fee will encourage a carrier to focus on intrastate rather than interstate commerce." *Id.* at 32a. And reviewing this Court's decisions, the court of appeals concluded that, "[i]n deciding this kind of issue, the Supreme Court's case law does not rely on the specific evidence in a specific case as the foundation for its conclusions concerning a particular tax. Rather, it focuses on the structure of the tax at issue[.]" *Ibid.*

Turning to the particulars of Oregon's flat tax, the court found that the relevant tax structure

> can readily be perceived by describing [a] hypothetical situation. Here, the focus is on carriers whose trucks travel more miles in Oregon than the amount that the legislature presumed. As one example, assume that the weight-mile tax for a particular truck is ten cents per mile, that the legislature presumes that the average truck carrying the commodity involved will travel 40,000 miles

per year in Oregon, and that the legislature has therefore set an alternative flat fee at $4,000 per year. Carrier A has trucks that actually travel 50,000 miles entirely in Oregon; it elects to pay the flat fee and therefore pays $4,000 per truck, or an effective rate of 8 cents rather than 10 cents per mile. Carrier B has trucks that also operate 50,000 miles, but they operate half the time in Oregon and half the time in other states with identical tax systems. Carrier B would lose money by electing to pay the flat fee in any state that has such a taxing scheme because the flat fee is calculated on an amount of mileage greater than its trucks will travel in any one state. Thus, economic necessity requires [C]arrier B to elect to be taxed on the basis of its mileage, and its total fees will be $5,000 per truck, or an effective rate of 10 cents per mile. Such a taxing scheme favors intrastate carriers over interstate carriers. Any other hypothetical situation, using any other figures for an unapportioned flat fee option, will show a similar malapportionment and discriminatory effect as to interstate carriers that exceed the presumed average miles.

In this hypothetical situation, the flat fee option will both exert pressure on the interstate carrier to change its operations to focus on interstate business and will discriminate against the interstate carrier if it does not do so. Only by focusing on intrastate business can the carrier pay the lower tax rate that similarly situated intrastate carriers are able to pay. The flat fee options, thus, discriminate between interstate and intrastate carriers whose businesses differ only because of their relationship to state boundaries, and the discrimination operates to the detriment of the interstate carrier.

App., *infra*, 32a-34a. The court of appeals accordingly held the flat tax options unconstitutional. *Id.* at 39a.

The Oregon Supreme Court reversed. App., *infra*, 1a-22a.[5] First addressing the internal consistency test, the court perceived no constitutional problem with the Oregon flat tax because "[t]he flat-fee option is aimed at operations that take place primarily in Oregon. If viewed as a tax, it is one imposed upon an activity that takes place exclusively within this state's borders." *Id.* at 18a. "As a result," the court concluded, "if every state replicated Oregon's flat-fee tax option under the same terms, we cannot hypothesize a scenario where the interstate commerce in logs, sand and gravel, or wood chips would be subject to multiple taxation or could be viewed as one state's attempt to take more than its fair share of taxes from transactions involving those commodities." *Ibid.*

The Oregon Supreme Court next rejected the proposition that petitioners could rely on the structure of the flat tax to establish its inherently discriminatory effect. Instead, the court below opined that this Court "has never viewed hypothetical possibilities, standing alone, as sufficient to constitute unconstitutional discrimination for Commerce Clause purposes." App., *infra*, 19a. The court found support for that position in *American Trucking Ass'ns, Inc.* v. *Michigan Public Service Commission*, 125 S. Ct. 2419 (2005), which it read to "make[] clear that plaintiffs cannot rely on hypothetical assertions to establish the existence of discriminatory economic effects; plaintiffs must demonstrate actual discrimination." App., *infra*, 22a.

In the court's view, no such showing was made in this case. The court recognized "the aggregate savings realized

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[5] The court began by concluding that the Oregon highway tax should not be regarded as a "user fee" and, instead, should be evaluated as a tax subject to the four-part Commerce Clause test set out in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). App., *infra*, 11a-16a.

under the flat fee." App., *infra*, 20a-21a. But it did not find that evidence probative because "plaintiffs do not break those figures down between in-state and out-of-state trucking operations, or otherwise show how the aggregate savings serve to set the two groups apart." *Id.* at 21a. The court therefore concluded that "there is nothing to show that the flat-fee option before us effectively has created an unconstitutionally protected trade area that prefers local commerce over interstate commerce." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents a recurring issue of great practical importance: whether state taxes that structurally disadvantage interstate commerce are invalid under the Commerce Clause. It is, of course, fundamental that state tax regimes may not discriminate in favor of domestic and against interstate businesses. The holding below, which approved just such a discriminatory tax, accordingly should not stand. That decision cannot be reconciled with *Scheiner* and other of this Court's precedents; contributes to a conflict in the lower courts about the meaning and application of the controlling Commerce Clause principles; and provides a model for state taxing authorities that wish to provide a commercial advantage to in-state businesses. Because the governing law is complex – as is suggested by the unanimous, and flatly inconsistent, decisions of the Oregon Court of Appeals and Oregon Supreme Court – and because the legal question presented is one of considerable significance to jurisdictions across the Nation, review of the decision below is warranted.

A. Flat Taxes On Motor Carriers Traveling Interstate Are Inherently Discriminatory

At the outset, the court below went astray in holding that Oregon's flat tax does not discriminate against interstate commerce – and in its related ruling that empirical evidence of discriminatory impact is necessary before a tax that im-

poses structural burdens on interstate commerce will be invalidated. That conclusion is inconsistent with this Court's precedents and conflicts with the holdings of federal courts of appeals and other state courts of last resort.

1. The structure of an unapportioned flat tax necessarily places interstate taxpayers at a disadvantage

While the Oregon flat tax nominally applies in the same amount to inter- and intrastate businesses, "the Commerce Clause has a deeper meaning that may be implicated even though state provisions * * * do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory." *Scheiner*, 483 U.S. at 281. Sixty years ago, in *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), the Court described why this is so. Striking down a flat municipal license fee imposed on interstate solicitors (so-called "drummers") doing business in the city, the Court explained:

> [T]he tax * * * cannot be taken to apply generally to local distributors in the same manner and with like effects as in application to out-of-state distributors. The very difference in locations of their business headquarters, if any, and of their activities makes this impossible. This, of course, is but another way of saying that the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application between those two classes of commerce, generally speaking, impossible.

Id. at 432.

In *Scheiner*, the Court applied this conclusion to invalidate flat Pennsylvania taxes on interstate motor carriers whose vehicles passed through the taxing jurisdiction. The Court noted that such flat levies necessarily disadvantage interstate businesses: "[T]he very nature of the market that in-

terstate operators serve prevents them from making full use of the privilege * * * for which they have paid the State" a flat fee. 483 U.S. at 284 n.16. Thus,

> "the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego [*sic*] the privilege some of the time simply because of its interstate character, *i.e.*, because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier."

Id. at 291 (quoting *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting)).

Against that background, the discriminatory impact of a flat levy like Oregon's is undeniable. A trucking company that confines its operations to Oregon and pays the flat tax travels for free once it exceeds the break-even mileage; as a practical matter, an otherwise identical interstate trucker that travels the same number of total miles will not have that option available because it will not reach the break-even point in any one state. The local company therefore will pay the tax at a lower effective rate than does its interstate competitor. And "imposition of [a] flat tax[] for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause. The great constitutional purpose of the Fathers cannot be defeated by using an apparently neutral 'guise of taxation which produces the excluding and discriminatory effect.'" *Scheiner*, 483 U.S. at 296 (quoting *Nippert*, 327 U.S. at 426).

Given this reality, when the structure of a flat tax necessarily discriminates against interstate businesses "'[i]n the general average of instances,'" there is no need for particularized proof of the per-mile or per-transaction disparity in the effective rates imposed on inter- and intrastate taxpayers. In

Nippert, for example, no such evidence was required. And although the Court pointed in passing to empirical evidence in *Scheiner* (see 483 U.S. at 286), that evidence was not essential to the Court's holding: the Court declared that "[t]he *method* of assessing the [flat] taxes in [*Scheiner*] on Pennsylvania-based vehicles and on other vehicles established that the State is not treating the two types of vehicle with an even hand." *Id.* at 282 (emphasis added).[6]

That the Oregon flat tax is optional does not vitiate its discriminatory nature. High-mileage trucks – those that exceed the break-even point and therefore find it worthwhile to elect the flat tax – pay Oregon's highway levy at a lower effective rate than those that pay the weight-mile tax. And, as we have explained, the flat fee option is not available as a practical matter to trucks that do substantial business across state lines. Moreover, even interstate trucks that *do* elect to pay the flat tax inevitably are placed at a competitive disadvantage. Because such trucks travel some of their mileage in

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[6] In reaching its conclusion that structural impediments to interstate commerce are not enough to establish discrimination, the court below relied on *Associated Industries of Missouri* v. *Lohman*, 511 U.S. 641 (1994). See App., *infra*, 19a-20a. But *Associated Industries* stands for no such proposition. To the contrary, the Court there reiterated that "as a general matter we have *rejected* reliance on any calculus that requires a quantification of discrimination as a preliminary step to determining whether the discrimination is valid. * * * [T]he magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred." 511 U.S. at 649-650 (emphasis added). The language from *Associated Industries* quoted by the court below rejected the assertion that the *potential* for the enactment of a discriminatory tax rate – even in a jurisdiction where a discriminatory tax rate *had not in fact been established* – rendered the tax regime unconstitutional. See *id.* at 654-655. That holding offers no support for the Oregon flat tax.

other states, they pay their Oregon tax at a higher effective rate per mile than do otherwise identical trucks that travel the same total number of miles but do so entirely in Oregon. And by definition, trucks that pay the Oregon flat tax pay both the flat fee to Oregon and highway taxes (on either a weight-mile or a flat-tax basis) to other states. An Oregon truck that travels the same number of miles but does so wholly intrastate pays only one tax.

Thus, as the court of appeals noted, the optional nature of the flat fee "may limit [its] discriminatory effect" (App., *infra*, 32a) by confining its benefits to a smaller number of favored truckers, but the fee continues to discriminate in favor of (selected) intrastate and against all interstate carriers. The Oregon Supreme Court did not suggest otherwise; it did not rely on the optional nature of the flat tax in rejecting the claim of discrimination.

2. The decision below conflicts with the holdings of federal courts of appeals and state courts of last resort that empirical evidence is not necessary to demonstrate the discriminatory nature of a flat highway tax

Given the inconsistency of the holding below with principles articulated by this Court, it is not surprising that the Oregon Supreme Court's decision flatly conflicts with the holdings of federal courts of appeals and other state courts of last resort. The Oregon court held that a plaintiff alleging discrimination under the Commerce Clause must present "evidence of an actual burden placed on interstate commerce." App., *infra*, 20a. Other courts, however, have rejected that proposition, holding that empirical proof of discrimination is *not* required to invalidate a flat highway tax on interstate transport under the Commerce Clause.

In *Trailer Marine Transport Corp.* v. *Vazquez*, 977 F.2d 1 (1st Cir. 1992), for example, the First Circuit struck down a

flat tax imposed on trailers by Puerto Rico to finance an accident compensation fund.[7] Despite the absence of empirical evidence establishing either the comparative effective rate of the tax as it applied to intrastate versus interstate trailers or the comparative costs imposed by those trailers on Puerto Rico, the court found that "the fee is clearly discriminatory in impact." *Id.* at 10. Speaking through Judge Boudin, the First Circuit explained:

> Under this fee structure a transient trailer * * * pays the same flat fee as local trailers * * * even though the transient trailers are presumptively going to cause far fewer accidents and impose far lower costs on the compensation fund than locally based trailers. The word "presumptive" has to be used in the absence of firm statistics; but the inference is so compelling that only the amount of discrimination, and not its fact, can plausibly be contested. * * * It does not matter whether the discrimination would actually force [the plaintiff] from the market or prevent certain goods from reaching Puerto Rico * * *. Once a state regulation or tax is found to *discriminate* against interstate commerce, it is presumptively invalid.

Id. at 10-11 (emphasis in original). Relying on *Scheiner*, the court added that it is "intuitively obvious" that, "on average," flat taxes impose higher per-mile charges on intrastate than on interstate vehicles. *Id.* at 11.

The Supreme Judicial Court of Massachusetts reached the same conclusion, striking down flat taxes on interstate motor carriers even in the absence of empirical evidence of discriminatory effect. Like the First Circuit, the Supreme Judi-

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[7] In reaching this conclusion, the First Circuit explained that "Puerto Rico is subject to the constraints of the dormant Commerce Clause doctrine in the same fashion as the states." 977 F.2d at 7.

cial Court explained that, "[a]lthough the discriminatory impact of the fees is not precisely quantifiable because the stipulated facts do not include statistics regarding the average number of miles traveled annually in Massachusetts by local trucks and by those registered in other jurisdictions, it is intuitively obvious that local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks." *American Trucking Ass'ns, Inc.* v. *Sec'y of Administration*, 613 N.E.2d 95, 101 (Mass. 1993).

Other state courts of last resort agree. See *American Trucking Ass'ns, Inc.* v. *State*, 852 A.2d 142, 163 (N.J. 2004) (flat fees are "structurally discriminatory, and [interstate carriers] should not be compelled to prove the precise level of the per-activity cost disparity"); *id.* at 161 (citing *Secretary of Administration*, among other decisions, for the proposition that other courts "did not require the complaining party to submit specific proofs of actual discrimination"); *Commonwealth* v. *American Trucking Ass'ns, Inc.*, 746 S.W.2d 65, 67 (Ky. 1988) ("Foreign motor carriers engaged in interstate commerce invariably travel on average * * * far less miles in Kentucky than do carriers based in this state. For that reason the foreign motor carriers incur the greatest per mile cost imposed by the [flat] tax."); *American Trucking Ass'ns, Inc.* v. *Goldstein*, 541 A.2d 955, 957, 958 (Md. 1988) (allegation was that "interstate carriers[] might tend to travel fewer miles in Maryland and thus pay a higher per-mile price" under flat tax; court held that, "under the *Scheiner* majority's analysis of flat-rate highway taxes, it would seem clear that [Maryland's flat tax] is inconsistent with the Commerce Clause"). See also *Government Suppliers Consolidating Serv., Inc.* v. *Bayh*, 975 F.2d 1267, 1281 (7th Cir. 1992) (invalidating flat registration fee on haulers of municipal waste; "[f]or the truck that hauls garbage only occasionally, the per-haul cost of the registration fee will be many times the cost to a hauler of in-state waste"); *Black Beauty Trucking, Inc.* v. *Indiana*

Dept. of State Rev., 527 N.E.2d 1163, 1165 (Ind. Tax 1988) ("[t]he discriminatory impact [of a flat tax] on the interstate carrier is readily apparent"); *American Trucking Ass'ns, Inc.* v. *State*, 556 N.W.2d 761, 768 (Wis. Ct. App. 1996) (invalidating flat tax absent empirical evidence).

The holding below, which required a showing deemed unnecessary by other courts, cannot be reconciled with these decisions. And the Oregon Supreme Court's departure from the approach taken by its sister courts – which goes to how taxpayers may establish a violation of the U.S. Constitution – involves a matter of considerable practical importance. Intervention by this Court to resolve this conflict accordingly is in order.

3. *The Oregon Supreme Court's reliance on* Michigan Public Service Commission *misunderstands this Court's holding and confuses the law*

The court below also erred in reasoning that this Court's holding in *Michigan Public Service Commission* stands for the proposition that empirical evidence showing an adverse effect on interstate commerce is necessary when challenging a flat tax that falls on the intrastate portion of an *interstate* journey. The Michigan tax upheld in that case assessed a "fee upon, and *only* upon, vehicles that engage in *intrastate* commercial operations – that is, on trucks that undertake *point-to-point hauls between Michigan cities*." 125 S. Ct. at 2422 (emphasis added). That consideration was crucial to the Court's decision. The Court emphasized that the Michigan fee fell "upon activities taking place exclusively within the State's borders." *Id.* at 2423. It noted that flat state licensing fees on such "local businesses and service providers" are, and always have been, ubiquitous. *Ibid.* And it distinguished *Scheiner* by emphasizing that a carrier becomes liable for the Michigan tax "only because it engages in *local*

business." *Id.* at 2425 (emphasis in original). It was this sort of tax on *intrastate* point-to-point carriage, the Court suggested, that would be upheld absent proof that it has an adverse impact on the movement of goods interstate. See *id.* at 2423-2424.

The Oregon flat tax is decisively different. Like the tax invalidated in *Scheiner* – and like the various flat taxes struck down by the decisions cited above – the Oregon levy is *not* limited to wholly in-state carriage. To the contrary, it applies to trucks that are simply traversing the State as part of an interstate journey; Oregon's highway tax (including both the weight-mile variant and, when elected, the flat tax) is "levied upon all trucks (interstate and intrastate) that use[] [Oregon's] roads, including trucks that merely crossed [the State's] borders to transport, say, [Washington] goods to [California] customers." *Michigan Pub. Serv. Comm'n*, 125 S. Ct. at 2425.[8] The tax invalidated in *Michigan Public Service Commission* thus "is distinguishable from * * * the fees invalidated in *Scheiner*" – and from the Oregon tax challenged here – "which applied to interstate trucks even when

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[8] Of course, the Oregon tax is "local" in the sense that it is imposed only upon the use of Oregon's highways, even though that use is part of a larger, interstate journey. But in that respect, the Oregon tax is identical to the Pennsylvania levy invalidated in *Scheiner* (and to all of the highway taxes struck down in the cases cited above). Pennsylvania necessarily imposed its tax on trucks "for the privilege of using [the] State's highway system" (483 U.S. at 269, 279); a state lacks the authority to tax travel that takes place on other states' highways. See *id.* at 284 n.16; 293-294. The crucial distinction between *Scheiner* and *Michigan Public Service Commission* is that the tax in the former was imposed upon trucks that were engaged in interstate journeys when they passed through the taxing jurisdiction, while the tax in the latter fell on a discrete local transaction that took place entirely within Michigan.

they engaged in *no* intrastate business." *Id.* at 2426 (Scalia, J., concurring in the judgment) (emphasis in original).[9]

The court below therefore misapprehended the import of *Michigan Public Service Commission*. In any event, as the decisions of other state and federal courts cited above make clear, *Scheiner* generally has been understood to require invalidation of flat taxes on motor carriers traveling interstate that are structured to discriminate against interstate commerce, even in the absence of empirical evidence establishing the magnitude of the discrimination. If that understanding is wrong, or if *Michigan Public Service Commission* changed the law, it should be this Court – and not the Supreme Court of Oregon – that says so.

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[9] That the Court regarded the local Michigan tax as different in kind from a levy that falls on use of a highway as part of an interstate journey also is made clear by what the Court identified as deficiencies in the plaintiffs' showing in *Michigan Public Service Commission*. The Court explained that the record did not show how often out-of-state trucks conducted local business in Michigan, whether the Michigan charge in fact discouraged such business, whether the possibility of obtaining a temporary permit alleviated the problem, whether a local commercial effect (if there was one) made a significant interstate difference, whether a variable fee would eliminate that difference, or whether the local fee "significantly deters interstate trade." 125 S. Ct. at 2424. The Court regarded the absence of such evidence as fatal to the challenge in *Michigan Public Service Commission*. But the Court struck down the tax in *Scheiner* even though the record in that case *also* lacked *any* evidence of that sort.

4. The Oregon Supreme Court's dismissal of the record evidence of discriminatory effect stated an erroneous legal standard and placed a nearly insuperable burden on taxpayers bringing challenges under the Commerce Clause

Finally, the decision below is especially distressing because there *is*, in fact, compelling evidence in the record of this case establishing the discriminatory effect of Oregon's flat tax. The Oregon Supreme Court's dismissal of that evidence as nonprobative was premised on a clear misunderstanding of the governing legal standard. It also, we suggest, reflects the very sort of excessive sympathy for domestic competitive interests that the Commerce Clause was designed to overcome.

The record shows that carriers opting to pay the flat tax, in the aggregate, paid the Oregon highway levy at a lower rate than did other taxpayers (indeed, at a rate low enough that it increased the profit margin of the typical beneficiary by approximately fifty per cent). The record also establishes that the *overwhelming* majority of taxpayers paying the flat tax were based in Oregon. See pages 4-5, *supra*. The court below dismissed this evidence on the ground that "plaintiffs do not break down those figures between in-state and out-of-state trucking operations, or otherwise show how the aggregate savings serve to set the two groups apart." App., *infra*, 21a. This analysis is wrong, for several reasons.

First, the court's reasoning simply blinks reality. Only 38 of the 1094 carriers electing to pay the flat tax, operating only 129 out of 4401 trucks subject to the flat tax, were based out of state (see pages 4-5, *supra*); on this record, it is inconceivable that in-state operators did not reap the vast bulk of the tax savings (and the competitive advantage) provided by the flat tax mechanism. The contrary holding below suggests

an almost willful disregard of the advantage provided by Oregon's regime to in-state taxpayers. As the Court put it in *Maryland* v. *Lousiana*, 451 U.S. 725, 759-760 (1981): "It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates."

Second, the Oregon Supreme Court evidently was of the view that a state tax is not discriminatory if some out-of-state taxpayers end up paying the tax at a lower effective rate than do some in-state taxpayers. See App., *infra*, 21a (to find discrimination court would have to assume "that out-of-state trucking operations somehow had been denied access to the benefits otherwise available to intrastate trucking firms and, therefore, had not contributed to the aggregate savings figures"). But this Court has rejected that view, explaining that the tax in *Scheiner* was not "saved because some out-of-state carriers which accrue high mileage in Pennsylvania pay the axle tax at a lower per-mile rate than some Pennsylvania-based carriers." 483 U.S. at 286. If the inherent tendency of the tax is to "exert[] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure," the levy does not become immune from challenge because some out-of-state taxpayers obtain a lower effective rate by *yielding* to that pressure and concentrating their activities in the taxing state. *Ibid.*

Third, the reasoning of the court below missed the central point here. As the court of appeals correctly noted, "what matters under the dormant Commerce Clause is not where a carrier is based but where it does business; a Washington carrier that pays a flat fee in Oregon would have the same economic pressure to focus on Oregon intrastate business that exists for an Oregon carrier that chose that option. The Ore-

gon flat fee options provided in ORS 825.480 create disproportionate pressure that the dormant Commerce Clause forbids." App., *infra*, 35a. The evidence here shows indisputably that carriers benefit from a lower effective rate if they divert more of their business to Oregon. And that effect "necessarily violates the commerce clause because it puts interstate carriers at a disadvantage when compared with intrastate carriers." *Id.* at 37a.

We therefore submit that the court below erred when it required an empirical showing of discriminatory impact. And if we are wrong in that submission, the court committed a legal error in rejecting the showing of discrimination actually made in this case. In either event, the holding below has inadequate regard for an important federal constitutional guarantee and should be set aside.

B. The Decision Below Misunderstood The Significance And Application Of The Commerce Clause Internal Consistency Test

The decision below also warrants review for a second reason. The Oregon Supreme Court held that the absence of internal consistency is immaterial if the activity or value subject to the challenged levy is not susceptible to taxation by multiple states. That conclusion, however, cannot be reconciled with decisions of this and other courts, which have applied the internal consistency test to evaluate the constitutionality of state levies that, in all relevant respects, were identical to the Oregon flat tax – and that held failure of the test to be fatal to those levies.

1. Unapportioned flat taxes like Oregon's lack internal consistency

To begin with, there is no doubt that the Oregon flat tax does lack internal consistency. As this Court has explained:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.

Oklahoma Tax Comm'n v. *Jefferson Lines*, 514 U.S. 175, 185 (1995) (emphasis added).

The Oregon tax fails that test. If all states imposed Oregon's combination of flat and weight-mile highway taxes, high-mileage carriers operating interstate inevitably would be placed at a disadvantage. Once they exceeded the break-even point, intrastate carriers would receive "free miles"; otherwise identical interstate carriers would not get that benefit because they typically would not reach the break-even point in any one state. And as we have explained, to the extent that interstate operators *did* achieve break-even mileage in one (or more) states, they *still* inevitably would remain at a competitive disadvantage. Wholly intrastate operators could run an unlimited number of excess miles for free; their interstate competitors, in contrast, although traveling the same number of total miles, would pay not only the Oregon flat tax, but also weight-mile taxes (or additional flat taxes) in other jurisdictions. In either case, such a system "would place interstate commerce at a disadvantage as compared with commerce intrastate." *Jefferson Lines*, 514 U.S. at 185. Moreover, once a carrier elects to pay the flat tax in any one state, the lure of free miles in that state and the burden of paying additional taxes in other states would place "inexorable hydraulic pressure" on the carrier to concentrate its business in the jurisdiction to which it paid the flat tax. *Scheiner*, 483 U.S. at 286.

The Oregon Supreme Court did not dispute any of this. Instead, it was of the view that the internal consistency test is useful only in determining whether the same value or activity is subject to taxation by more than one state. Given that view of the test, the court held that, because Oregon's highway tax is "imposed upon an activity that takes place exclusively within this state's borders" – that is, use of Oregon's highways – "if every state replicated Oregon's flat-fee tax option under the same terms, we cannot hypothesize a scenario where the interstate commerce in logs, sand and gravel, or wood chips would be subject to multiple taxation or could be viewed as one state's attempt to take more than its fair share of taxes from transactions involving those commodities." App., *infra*, 18a. Because the court believed avoidance of duplicative taxation to be the only value served by internal consistency, it rejected the constitutional challenge here.

2. The internal consistency test can be used to determine whether a state tax imposes discriminatory, structural burdens on interstate commerce

The conclusion reached by the Oregon Supreme Court plainly was wrong. To be sure, the internal consistency test is useful in determining whether values subject to tax are properly apportioned between the states; "[a] failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from [an] interstate transaction." *Jefferson Lines*, 514 U.S. at 185. But because a state tax that fails the internal consistency test places interstate commerce at an insuperable structural disadvantage, failure of that test also demonstrates that the tax *discriminates* against interstate commerce. The Court has noted that point repeatedly. See *Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Rev.*, 483 U.S. 232, 247 (1987) (describing the test's application to both the nondiscrimination and the apportionment requirements of the Commerce

Clause); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 644 (1984) (same); *United States* v. *Sperry Corp.*, 493 U.S. 52, 61 n.7 (1989) (failure of internal consistency test in *Scheiner* revealed that the effect of the Pennsylvania tax "was to subject out-of-state vehicles * * * to a much higher charge per mile traveled"). See also *American Trucking Ass'ns, Inc.* v. *State*, 852 A.2d at 163-164 (same).

That was the case in *Scheiner*. The highway tax at issue there was, in all the respects regarded as relevant by the court below, identical to the Oregon flat tax. As we have noted (see note 8, *supra*), both taxes were imposed on the use of the taxing state's highways; like Oregon's tax, the Pennsylvania levy posed no possibility of duplicative taxation or taxation of extraterritorial values. This Court nevertheless applied the internal consistency test to invalidate the flat Pennsylvania tax, finding that the absence of internal consistency meant that, if every state imposed an equivalent levy, "there is no conceivable doubt that commerce among the States would be deterred." 483 U.S. at 284 (footnote omitted). Like other taxes that failed the test, the Court added, the Pennsylvania tax "has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 286-287 (quoting U.S. Const. Art. I, § 8, cl. 3). That conclusion cannot be squared with the Oregon Supreme Court's decision.[10]

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[10] The same thing was true in *Armco*. There, the Court applied the internal consistency test to invalidate a West Virginia regime that imposed a tax on wholesaling and manufacturing, but exempted local manufacturers from the wholesaling tax. The problem was not that a multiple tax burden was imposed on a single interstate activity, but that the system gave preferential treatment to a tax-

3. *The holding below that a state highway tax cannot violate the internal consistency test because it does not pose the threat of duplicative taxation conflicts with the decisions of federal courts of appeals and other state courts of last resort*

The decision below also conflicts with the holdings of federal courts of appeals and other state courts of last resort, which have applied the internal consistency test to invalidate flat state highway taxes that, like Oregon's, were "imposed upon an activity that t[ook] place exclusively within th[e taxing] state's borders." App., *infra*, 18a. See *American Trucking Ass'ns, Inc.* v. *Sec'y of State*, 595 A.2d 1014, 1017 (Me. 1991) (flat tax imposed on transportation of hazardous materials on Maine highways "clearly violate[s] the 'internal consistency test'"); *American Trucking Ass'ns, Inc.* v. *Sec'y of Administration*, 613 N.E.2d at 101 (flat taxes on use of Massachusetts highways "appear to violate the internal consistency test because the imposition of the full measure of each fee is triggered by an interstate truck simply crossing the border of Massachusetts"); *American Trucking Ass'ns, Inc.* v. *State*, 852 A.2d at 164 (flat fee on collection or delivery of waste in New Jersey "fail[s] the internal consistency test"); *Commonwealth* v. *American Trucking Ass'ns, Inc.*, 746 S.W.2d at 67 (flat tax on use of Kentucky highways "falls when the 'internal consistency test' referred to in *Scheiner* is applied"). See also *Government Suppliers Consolidating Serv.*, 975 F.2d at 1282 (holding flat registration fee on vehicles transporting municipal waste unconstitutional under *Scheiner*'s internal consistency analysis because, "[i]f other states were to adopt registration fees similar to Indiana's, the divisive and disruptive effect on interstate commerce in mu-

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payer that conducted both activities in a single state. See 467 U.S. at 644-645.

nicipal waste would be magnified"); *American Trucking Ass'ns, Inc.* v. *State*, 556 N.W.2d at 766 (holding flat registration fee on transportation of hazardous materials unconstitutional because it violates internal consistency test).

C. The Question Presented Here Is An Important And Recurring One

The Oregon Supreme Court's holding thus both departs from this Court's decisions and creates a conflict among the lower courts. Because questions about the validity of flat state taxes on interstate commerce – and, more broadly, about the means by which discrimination against interstate commerce may be established – are recurring ones of considerable importance, review by this Court is warranted.

As the conflict in the lower courts makes clear, jurisdictions across the Nation continue to impose unapportioned taxes on interstate commerce – and, indeed, many impose flat taxes on interstate motor carriers that, in the respects regarded as relevant by the Oregon Supreme Court, are indistinguishable from the flat tax at issue in this case. A number of states, for example, impose flat per-vehicle or per-carrier fees on transporters of hazardous materials.[11] The validity of

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[11] See, e.g., Cal. Veh. Code §2502(c) ($100 motor carrier permit fee and $75 motor carrier renewal permit fee); Col. Rev. Stat. Ann. § 42-20-202(1)(b), (c) (transporters of hazardous waste pay flat annual fee, depending on number of vehicles operated in State, of $10 to $400; $25 single trip permit); Conn. Gen. Stat. Ann. § 22a-454(a) ($500 annual fee on transporters of hazardous waste); Code Del. Reg. 10-400-007 ($300 annual fee on transporters of hazardous waste); Ga. Code § 46-11-4 (i) ($100 annual motor carrier company permit fee); Iowa Code Ann. § 455B.424(5)(c) ($25 fee for transporters of hazardous waste); Kan. Admin. Regs. 28-31-10(f) ($300 annual "monitoring fee" on transporters of hazardous waste); Md. Code Ann. Envir. § 7-252(a)(2), (b)(2)(ii) (annual $50 vehicle certificate fee for hazardous materials transporters; annual

the test used below to uphold the Oregon tax accordingly raises a vital question that is of national significance.

In addition, the Oregon Supreme Court's decision will encourage expanded use of unapportioned taxes by the states, as well as continued litigation about the validity of those levies. In response to the holding in *Scheiner*, several states candidly acknowledged that their flat motor carrier fees were unconstitutional.[12] But other states began a lengthy and continuing campaign to circumvent *Scheiner* by arguing, for example, that apportionment of their flat taxes was impracticable and therefore unnecessary,[13] or by contending that their taxes were per se nondiscriminatory and properly

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$20 driver certificate fee); Mich. C.L.A. § 29.473(b)(3) (in addition to apportioned fee, transporters of hazardous waste pay $50 "administrative fee"); Minn. Stat. Ann. § 221.0355(4)(b) (in addition to apportioned fee, transporters of hazardous waste pay $50 "processing fee"); Nev. Admin. Code § 459.9805(1)(b), (d) ($125 "general processing fee" for transporters of hazardous materials; $500 triennial "permit review fee"); N.Y. ECL § 72-0502 (hazardous waste transporter pays annual $500 fee for first vehicle, $200 fee for each additional vehicle; other waste transporters pay $250 annual fee for first vehicle and $100 for each additional vehicle); N.C. Gen. Stat. § 130A-294.1(j) ($600 annual fee on transporters of hazardous waste); Ohio Rev. Code § 4905.80(C)(1)(a) (in addition to apportioned fee, hazardous waste transporters pay $50 "processing" fee); Tex. Nat. Res. Code § 113.131 (d)(1) (liquefied petroleum gas trailers and delivery units pay flat annual fee of $100 to $300); Tex. Nat. Res. Code § 116.072 (c)(1) (trailers and delivery units transporting compressed natural gas pay flat annual fee of $100 to $500); Wy. Stat. § 37-14-103(a) ($200 fee for each package of radioactive material transported in State).

[12] See, *e.g.*, *Goldstein*, 541 A.2d at 957, 958; *American Trucking Assn's, Inc.* v. *Conway*, 566 A.2d 1335 (Vt. 1989).

[13] See, *e.g.*, *American Trucking Ass'ns* v. *State*, 556 N.W.2d at 767.

apportioned because they were "user fees,"[14] or by asserting that their flat taxes were supportable because the costs imposed upon the state through the taxpayer's use of its roads were unrelated to the miles traveled in the jurisdiction by the taxpayer.[15] The decision below, which accepted the argument that taxpayers must adduce some sort of special, empirical showing of discriminatory effect even when challenging a tax that imposes structural burdens on interstate commerce, marks the latest skirmish in this campaign and will provide powerful support and encouragement for additional litigation in this area.

Finally, this Court has recognized its special role in policing state actions that disadvantage interstate commerce. Whether or not "the facts of this particular case, viewed in isolation, * * * appear to pose any threat to the health of the national economy,"

> history, including the history of commercial conflict that preceded the constitutional convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history, provides the context in which each individual controversy must be judged. The history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union. As Justice Cardozo recognized, to countenance discrimination of the sort that [Oregon's] statute represents would invite significant inroads on our "national solidarity."

Camps Newfound/Owatonna, Inc. v. *Town of Harrison*, 520 U.S. 564, 595 (1997) (quoting *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). In light of this important principle, the Court has acknowledged its "'duty to determine

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[14] See, *e.g.*, *Sec'y of Admin.*, 613 N.E.2d at 101-103.

[15] See, *e.g.*, *Sec'y of State*, 595 A.2d at 1016.

whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.'" *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994) (quoting *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-456 (1940)).

Here, the discriminatory impact is manifest. Because the decision below declined to remedy that discrimination, leaves the law in a state of considerable confusion, and addresses legal issues that are important and recurring ones, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF OREGON

AMERICAN TRUCKING ASSOCIATIONS, INC., a District of Columbia Corporation, CRST, Inc., an Iowa corporation, USF Reddaway Inc., an Oregon corporation, Kenneth E. Mansigh Trucking, Inc., a Washington corporation, and Veneer Chip Transport, Inc., a Washington corporation, on behalf of themselves and all other Similarly-Situated Weight-Distance Taxpayers, Respondents on Review,

v.

STATE of Oregon, DEPARTMENT OF TRANSPORTATION and Grace Crunican, Director, Department of Transportation, Petitioners on Review, and AAA Oregon/Idaho, an Oregon corporation, Intervenor-Petitioner on Review.

CC No. 00C16242; CA A117694; SC S51622, S51623.

En Banc
On review from the Court of Appeals.*

Argued and Submitted May 10, 2005.
Decided Dec. 15, 2005.

De MUNIZ, J.

The issue in this case is whether the Oregon "flat fee" highway tax alternatives that are available to heavy trucks hauling certain commodities in either interstate or intrastate commerce violate the Commerce Clause of the United States Constitution.[1] American Trucking Associations, Inc., and

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* Appeal from Marion County Circuit Court, Claudia Burton, Judge. 193 Or.App. 185, 90 P.3d 15 (2004).

[1] Article I, section 8, clause 3, of the United States Constitution grants Congress the authority to "regulate Commerce * * * among the several States[.]" The United States Supreme Court has inter-

several other trucking companies (plaintiffs) sought a judgment declaring, among other things, that the provisions of ORS 825.480(1), (4), and (5)[2] that offer a flat-fee tax option

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preted that provision as imposing restrictions on state taxes, fees, or regulations that discriminate against or unduly burden interstate commerce. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) ("we have consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject").

[2] Plaintiffs filed their first Amended Complaint in December 2000 under the 1999 version of ORS 825.480. With the exception of a rate increase implemented in 2003, however, the text of that provision has remained the same. Because the operative text has not changed since 1999, we use the current version of ORS 825.480 throughout this opinion. That version of the statute provides, in part:

> "(1)(a) In lieu of other fees provided in ORS 825.474, carriers engaged in operating motor vehicles in the transportation of logs, poles, peeler cores or piling may pay annual fees for such operation computed at the rate of six dollars and ten cents for each 100 pounds of declared combined weight.
>
> "(b) Any carrier electing to pay fees under this method may, as to vehicles otherwise exempt from taxation, elect to be taxed on the mileage basis for movements of such empty vehicles over public highways whenever operations are for the purpose of repair, maintenance, servicing or moving from one exempt highway operation to another.
>
> " * * * * * *
>
> "(4)(a) In lieu of other fees provided in ORS 825.474, carriers engaged in the operation of motor vehicles equipped with dump bodies and used in the transportation of sand, gravel, rock, dirt, debris, cinders, asphaltic concrete mix,

to certain non-farm-use carriers, as well as similar provisions for farm-use trucks, violated the Commerce Clause. Plaintiffs also sought injunctive relief and a refund of taxes paid pursuant to those provisions. Defendants in the case are the Oregon Department of Transportation and its director, as well as intervenor-defendant AAA Oregon/Idaho. The trial court dismissed plaintiffs' action below. The Court of Appeals subsequently affirmed that judgment as to the flat-fee alternatives for farm-use trucks, but reversed regarding the tax alternatives for non-farm-use trucks. The Court of Appeals concluded that the flat-fee alternatives for non-farm-use carriers violated the Commerce Clause by creating a fee

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metallic ores and concentrates or raw nonmetallic products, whether crushed or otherwise, moving from mines, pits or quarries may pay annual fees for such operation computed at the rate of six dollars and five cents for each 100 pounds of declared combined weight.

"(b) Any carrier electing to pay fees under this method may, as to vehicles otherwise exempt for taxation, elect to be taxed on the mileage basis for movements of such empty vehicles over public highways whenever operations are for the purpose of repair, maintenance, servicing or moving from one exempt highway operation to another.

"(5)(a) In lieu of other fees provided in ORS 825.474, carriers engaged in operating motor vehicles in the transportation of wood chips, sawdust, barkdust, hog fuel or shavings may pay annual fees for such operation computed at the rate of twenty-four dollars and sixty-two cents for each 100 pounds of declared combined weight.

"(b) Any carrier electing to pay under this method may, as to vehicles otherwise exempt from taxation, elect to be taxed on the mileage basis for movement of such empty vehicles over public highways whenever operations are for the purpose of repair, maintenance, service or moving from one exempt highway operation to another."

structure that had a discriminatory effect on trucks engaged in interstate commerce. *American Trucking Assns., Inc. v. State of Oregon*, 193 Or.App. 185, 90 P.3d 15 (2004). We allowed defendant's petition for review and now reverse the Court of Appeals decision as it pertains to non-farm-use carriers, otherwise affirm the remainder of that decision, and affirm the trial court's judgment.

We take the relevant facts from the opinion of the Court of Appeals.

> "The primary method under which Oregon taxes heavy trucks that use its highways is a weight-mile tax. ORS 825.450-825.555. Under that tax, a trucking carrier pays a rate for each mile that its trucks operate on the state's public highways. The tax is based on the weight that the carrier declares to be the truck's maximum legal weight; the higher the declared weight, the higher the per-mile tax for that truck. ORS 825.474-825.476. A truck that pays the weight-mile tax does not pay the fuel tax that the state charges other vehicles and may take any fuel tax paid as a credit against the weight-mile tax. ORS 825.486. A carrier must maintain records of the declared weights of its trucks and the miles that they travel in order to make the required reports and calculate the amount of tax owed.
>
> "Plaintiffs do not question the constitutionality of the weight-mile tax itself. Rather, they attack two exceptions to it.[3] The first exception concerns the flat fee

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[3] The second weight-mile tax exception at issue on appeal involved the exception for farm vehicles set forth in ORS 825.480(3). As already noted above, the Court of Appeals affirmed the trial court's judgment regarding that issue, and the parties have not raised it on review. Consequently, we do not address that issue here.

options provided in ORS 825.480 for certain commodities. That statute gives carriers of three categories of commodities-- logs, sand and gravel carried in dump trucks, and wood chips--the option to choose to pay a flat fee rather than the weight-mile tax. ORS 825.480(1), (4), and (5). For each commodity, the legislature established the fee at an amount that it believed to be identical to what a truck of the same weight carrying that commodity would pay in weight-mile tax if it operated as many miles per year as an average truck that carried that commodity. *The calculations are based on the assumption that the truck in question operates entirely in Oregon.* The flat fee option is available to carriers who are located in Oregon or any other state. The legislature has adjusted the amounts a number of times in order to reflect changes in the average mileage and in the weight-mileage rates since it originally adopted the flat fee options. If a carrier elects a flat fee option, it must do so for all the trucks in its fleet that carry that commodity, and it may make that election only once per year. ORS 825.480(2). A carrier that chooses to pay a flat fee must still report the mileage that it travels on public highways, OAR 740-055-0120; however, because those reports do not affect the taxes that the carrier pays, the state does not audit them.

"Trucks carrying commodities that have a flat fee option are more likely than trucks carrying other commodities to use nonpublic roads for significant portions of their trips, to use lesser-traveled public roads, and to make multiple short journeys. All of those factors make it more difficult for carriers to keep the records that the weight-mile tax requires and for the state to enforce the tax. Flat fee carriers also tend to be small operators, for whom record-keeping is especially burdensome. Thus, one purpose of the

> flat fee option is to ease the burden on both the carriers and the state of administering and enforcing the weight-mile tax.
>
> "Although the legislature intended the flat fee options to be revenue neutral, they are not, at least for haulers of logs or of sand and gravel. The best estimates, based on data that are not fully reliable, are that, for the most recent period for which figures were available at the time of trial, wood chip carriers who chose the flat fee option as a group paid $27,315.75 more than they would have paid under the weight-mile tax, while sand and gravel carriers paid $276,535.86 less and log carriers paid $1,164,585.86 less. For sand and gravel carriers, the underpayments are equivalent to 1.34 cents per mile, while for log carriers they are equivalent to 1.9 cents per mile. For purposes of comparison, the average profit margin in the trucking industry is 3 cents per mile."

193 Or.App. at 188-90, 90 P.3d 15 (footnote omitted; emphasis added).

On appeal, plaintiffs argued, in part, that, under *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987), the highway fees at issue were malapportioned and therefore discriminatory in their practical effect. Specifically, plaintiffs argued that *Scheiner* supported the notion that the Oregon flat-fee tax options for trucks carrying logs, sand and gravel, or wood chips impermissibly exerted a "hydraulic pressure" on out-of-state motor carriers hauling those commodities to concentrate their activities in-state to fully take advantage of the flat-fee system. That was so, plaintiffs maintained, because any advantage to be obtained under the flat-fee system--presumably by driving more miles within Oregon than outside of it--would invariably be more available to an Oregon-based motor carrier than to an

out-of-state carrier. The result, plaintiffs maintained, was inherently discriminatory.

The Court of Appeals agreed. Drawing on *Scheiner's* iteration of the Supreme Court's "internal consistency" test,[4] the Court of Appeals set out the following hypothetical scenario:

> "Here, the focus is on carriers whose trucks travel more miles in Oregon than the amount that the legislature presumed. As one example, assume that the weight-mile tax for a particular truck is 10 cents per mile, that the legislature presumes that the average truck carrying the commodity involved will travel 40,000 miles per year in Oregon, and that the legislature has therefore set an alternative flat fee at $4,000 per year. Carrier A has trucks that actually travel 50,000 miles entirely in Oregon; it elects to pay the flat fee and therefore pays $4,000 per truck, or an effective rate of 8 cents rather than 10 cents per mile. Carrier B has trucks that also operate 50,000 miles, but they operate half the time in Oregon and half the time in other states with identical tax systems. Carrier B would lose money by electing to pay the flat fee in any state that has such a taxing scheme because the flat fee is calculated on an amount of mileage greater than its trucks will travel in any one state. Thus, economic necessity requires carrier B to elect to be taxed on the basis of its mileage, and its total taxes will be $5,000 per truck, or an effective rate of 10 cents per mile. Such a taxing scheme favors intrastate carriers over interstate carriers. Any other hypothetical situation, using any other figures for an

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[4] The "internal consistency" test is a component of the framework used to determine whether state-levied taxes and fees affecting interstate commerce have been fairly apportioned. The test is discussed in greater detail below.

> unapportioned flat fee option, will show a similar malapportionment and discriminatory effect as to interstate carriers that exceed the presumed average mileage.
>
> "In this hypothetical situation, the flat fee option will both exert pressure on the interstate carrier to change its operations to focus on intrastate business and will discriminate against the interstate carrier if it does not do so. Only by focusing on intrastate business can the carrier pay the lower tax rate that similarly situated intrastate carriers are able to pay. The flat fee options, thus, discriminate between interstate and intrastate carriers whose businesses differ only because of their relationship to state boundaries, and the discrimination operates to the detriment of the interstate carrier. The flat fee options do not apportion the tax burden among the states where the interstate carrier operates, and they therefore fail the 'internal consistency' test."

American Trucking, 193 Or.App. at 195-96, 90 P.3d 15 (footnotes omitted). As a result, the Court of Appeals concluded that the flat-fee options before it violated the Commerce Clause and were therefore unconstitutional. This court subsequently accepted review to consider that constitutional issue.

Although the Commerce Clause is framed as an affirmative grant of commerce-regulating power to Congress, the United States Supreme Court has interpreted the clause to also embody an implicit negative command forbidding states from enacting laws that interfere with the flow of free trade across the nation. *See, e.g., Oregon Waste Systems, Inc. v. Environmental Quality Commission of the State of Oregon*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (Commerce Clause contains " 'negative' aspect that denies the States the power unjustifiably to discriminate against or

burden" interstate commerce). At the same time, the Court also has made clear that the Commerce Clause will not excuse interstate commerce from shouldering its fair share of state tax burdens as it makes its way:

> "[D]ecisions of this Court, particularly during recent decades, have sustained nondiscriminatory properly apportioned state corporate taxes upon foreign corporations doing an exclusively interstate business when the tax is related to a corporation's local activities and the State has provided benefits and protections for those activities for which it is justified in asking a fair and reasonable return."

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 287, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), *quoting Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108, 95 S.Ct. 1538, 44 L.Ed.2d 1 (1975). The respective values underlying each of those ideas--the value of facilitating a free flow of commerce between the states and the value of making such commerce pay its way in the process--can, in practical application, often clash if not carefully regulated.

In seeking to maintain the boundaries that allow those frequently competing priorities to operate in harmony, we are faced, at the outset, with a problem common to most courts considering a Commerce Clause issue today: What is the proper analytical framework for examining the case at hand? That question stems, in part, from the plethora of different tests that the Supreme Court has created over the years to analyze state taxation and fee-setting measures that implicate interstate commerce.[5] The result, as the Court itself has de-

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[5] The following list is by no means exhaustive: *Oregon Waste Systems, Inc. v. Environmental Quality Commission of the State of Oregon*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (facially different state treatment of in-state and out-of-state economic interests that benefit the former and burden the latter is *per se* invalid under Commerce Clause, unless state can show legiti-

scribed it, often resembles a "quagmire" of differently phrased tests that rarely offer explicit guidance, outside of fact-matching, as to when and under what circumstances a particular test should be applied. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 315, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) (noting that "our law in this area is something of a 'quagmire'"); *Scheiner*, 483 U.S. at 280, 107 S.Ct. 2829 (recognizing that past Commerce Clause decisions have been described as a " 'quagmire' of judicial responses"). Here, the question of how to analyze this Commerce Clause issue is particularly important because the parties begin by

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mate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives); *Armco Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984) (state tax does not discriminate in violation of Dormant Commerce Clause if it possesses internal consistency, i.e., if same tax could be applied by every other state with no impermissible interference with free trade); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (state tax statute will be sustained against Commerce Clause challenge if taxed activity has a substantial nexus with the state and tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by state); *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 716-17, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972) (state toll is constitutional when based on fair approximation of use or privilege to use that does not discriminate against interstate commerce and is not excessive in relation to benefits conferred, even though alternative formula might better reflect use of facilities by individual users); *Pike v. Bruce Church*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (state regulation effectuating legitimate public purpose and having only incidental effect on interstate commerce will be upheld against Commerce Clause challenge unless burden imposed clearly exceeds local benefits; extent of burden tolerated depends on nature of local interest).

presenting this court with competing viewpoints on which test is the proper one to use.

Defendants urge us to analyze the fee scheme now before us as a "use" tax under the test set out in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972). In *Evansville-Vanderburgh*, the Supreme Court considered whether the Commerce Clause allowed state and municipal governments to impose a $1.00 service charge for each passenger boarding commercial aircraft at local airports. Analogizing those charges to highway tolls, the Court ultimately upheld the constitutionality of such fees, articulating, in the process, the following test:

> "At least so long as the toll is based on some fair approximation of use or privilege for use, as was that before us in *Capitol Greyhound [Lines v. Brice*, 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053 (1950)], and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users."

Id. at 716-17, 92 S.Ct. 1349. Defendants argue that, because the flat-fee option is essentially an assessment for highway use with its proceeds dedicated to Oregon highways, the fee should be scrutinized as a use tax using the framework described above rather than the somewhat more stringent tests often applied to general revenue-raising measures.

In response, plaintiffs contend that the four-factor test of *Complete Auto Transit* represents the appropriate analysis to be applied here. At issue in *Complete Auto Transit* was a Mississippi tax statute that required all businesses engaged in transporting persons or property for hire to pay a percentage of gross income for the privilege of operating within the

state. The Supreme Court upheld the tax against the out-of-state plaintiff's Commerce Clause challenge, relying on the consistency of its decisions sustaining similar taxes

> "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

430 U.S. at 279, 97 S.Ct. 1076. Plaintiffs point in particular to the fair apportionment and nondiscrimination elements of the test, arguing that whether a state tax or fee meets those two requirements is a matter further subject to a separate test for "internal consistency." Explaining the nature of internal consistency in *Armco Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984), the Supreme Court wrote:

> "In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983), the Court noted that *a tax must have 'what might be called internal consistency--that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade.* In that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce. A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce."

Id. at 644, 104 S.Ct. 2620 (emphasis added). Plaintiffs contend that the flat-fee option at issue here lacks internal consistency, rendering the fee malapportioned and discriminatory for purposes of interstate commerce and,

therefore, unable to withstand constitutional scrutiny under the *Complete Auto Transit* test.

Although both tests appear to remain viable as Supreme Court precedents in that neither has been overruled by a subsequent decision, several factors weigh heavily in favor of using *Complete Auto Transit's* analytical framework here rather than the *Evansville-Vanderburgh* test. First, aside from the *Evansville-Vanderburgh* case itself, the test articulated therein has never actually been used again by a majority of the Court to decide a Commerce Clause controversy. Following the *Evansville-Vanderburgh* decision, Congress

> "concluded that the proliferation of local taxes burdened interstate air transportation, and, when coupled with the federal Trust Fund levies, imposed double taxation on air travelers. To deal with these problems, Congress passed § 7(a) of the Airport Development Acceleration Act of 1973[.]"

Aloha Airlines, Inc. v. Director of Taxation of Hawaii, 464 U.S. 7, 9-10, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983) (footnote omitted). The new federal statute essentially nullified the effect of *Evansville-Vanderburgh* on air travel by prohibiting the states from levying any fee on individuals traveling by air or on the activities associated with transporting them. *Id.* at 10, 104 S.Ct. 291. Since then--perhaps out of an abundance of caution--none of the 12 Supreme Court cases citing *Evansville-Vanderburgh* has employed its test to resolve a Commerce Clause dispute.[6]

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[6] The Supreme Court has, however, used the test for other purposes. In *Commonwealth of Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed.2d 403, (1978), the Court used the test-- substituting the phrase "state function" for "interstate commerce"--to hold that a federal registration tax on civil aircraft did not violate the implied immunity of a state government from federal taxation. *In Northwest Airlines, Inc. v. County of Kent,*

Second--in contrast to the *Evansville-Vanderburgh* framework--*Complete Auto Transit's* four-factor test represents an important shift in the Supreme Court's Commerce Clause jurisprudence and has seen regular and recent use. Prior to *Complete Auto Transit*, the old rule had been that state taxes levied on the "privilege" of doing business within a state were *per se* unconstitutional when applied to what was exclusively interstate commerce. *See Spector Motor Service v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951) (so stating). At the same time, the Court consistently had recognized that interstate commerce could be made to pay its way as it moved through the states. The result was that, by the time of *Complete Auto Transit*, the old rule had been stripped of most of its practical significance, and replaced, instead, with a formalistic exercise that often focused more on eliminating words such as "privilege" from commerce-related statutes rather than examining the statutes' practical effects. For example, under the old rule, the Supreme Court struck down a Virginia statute creating a "license tax" on gross business receipts levied for the "privilege

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Michigan, 510 U.S. 355, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994), the Court also used the test to ascertain whether fees assessed against commercial airlines for the use of a county's airport facilities were reasonable under the federal Anti-Head Tax Act. At the end of the day, the only other case in which a majority of the Court has used the *Evansville-Vanderburgh* test in a Commerce Clause context is *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226. In deciding *Scheiner*, however, the Court did not actually apply the *Evansville-Vanderburgh* test as its controlling rationale; instead, the Court relied upon the internal consistency test set out in *Armco*, 467 U.S. at 644, 104 S.Ct. 2620 for that purpose. The Court cited the *Evansville-Vanderburgh* test primarily to refute the State of Pennsylvania's argument that the taxes at issue in *Scheiner* were just like the user fees that the Court had upheld in *Evansville-Vanderburgh*.

of doing business" in the state. *See Railway Express Agency v. Virginia*, 347 U.S. 359, 74 S.Ct. 558, 98 L.Ed. 757 (1954) (so holding). Several years later, the Court upheld an amended version of the same statute, reworded to impose a "franchise tax" on a business's "going concern" value as measured by its gross receipts. *See Railway Express Agency v. Virginia*, 358 U.S. 434, 79 S.Ct. 411, 3 L.Ed.2d 450 (1959) (so holding). In *Complete Auto Transit*, the Court recognized that no real economic difference had resulted from manipulating the wording of those statutes and that its old rule of *per se* unconstitutionality had been reduced, in large part, to an axiom that often distracted courts from the more critical inquiry "into whether the challenged tax produced results forbidden by the Commerce Clause." 430 U.S. at 285, 97 S.Ct. 1076. The Court then expressly rejected its old rule. The four-factor test that replaced it was, if nothing else, an effort to better focus the judiciary on the actual concerns that the Commerce Clause was intended to address.

Since that time, to the extent that one test can be singled out as surfacing with regularity among Supreme Court Commerce Clause cases, *Complete Auto Transit's* four-part analysis is conspicuous for having appeared with greater frequency and in a broader range of substantive applications than the *Evansville-Vanderburgh* test.[7] More importantly, the Court cited the *Complete Auto Transit* test with apparent

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[7] See, *e.g.*, *Oklahoma Tax Commission*, 514 U.S. 175, 115 S.Ct. 1331 (applying test to sales tax on bus tickets); *Goldberg v. Sweet*, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989) (applying test to tax on telephone calls); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988) (applying test to state use tax); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983) (applying test to franchise tax); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct 2946, 69 L.Ed.2d 884 (1981) (applying test to severance tax).

approval in deciding *American Trucking Associations, Inc. v. Michigan Public Service Commission*, ___ U.S. ____, 125 S.Ct. 2419, 162 L.Ed.2d 407 (2005), the Court's most recent Commerce Clause decision. That case, like this one, concerned a flat-fee assessment on intrastate hauling. As a result of that similarity, along with the other reasons discussed above, we conclude that *Complete Auto Transit's* four-factor test is the more appropriate analytical format for reviewing the issues presented here. Under that test, a state tax will survive Commerce Clause scrutiny if (1) the taxed activity has a sufficient nexus with the state to justify the tax; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the amount of the tax is fairly related to the benefits provided to the taxpayer.[8] 430 U.S. at 279, 97 S.Ct. 1076. We turn now to that inquiry.

As the parties have framed the issues on review, this case arguably implicates only the apportionment and discrimination prongs of the *Complete Auto Transit* analysis. On appeal, the Court of Appeals agreed with plaintiffs that, under *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226, and its application of the internal consistency test, the flat-fee option at issue here was both malapportioned and discriminatory. Plaintiffs now essentially urge this court to do the same. We turn first to the apportionment question.

In *Goldberg v. Sweet*, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989), the Supreme Court stated that, with regard to interstate commerce, the requirement of proper apportionment is aimed at preventing individual states from taxing more than their fair share of an interstate transaction:

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[8] Although defendants argue that other tests are more appropriate, they have nevertheless presented alternative arguments using the four-factor analysis of *Complete Auto Transit* to support their positions on review.

> "In analyzing these contentions, we are mindful that the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction."

Id. at 260-61, 109 S.Ct. 582. A state tax is fairly apportioned for purposes of interstate commerce if it is both internally and externally consistent. The parties do not contest the external consistency of the flat-fee option in this case.[9] Plaintiffs, however, argue that Oregon's flat-fee option lacks internal consistency.

To be internally consistent, "a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Id.* at 261, 109 S.Ct. 582. To examine a tax for malapportionment, the internal consistency test essentially extrapolates a hypothetical application of the challenged state tax or fee across all the states and scrutinizes the results for signs of overreaching:

> "This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. *A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction*, since allowing such a tax in one State would place interstate com-

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[9] External consistency focuses on the economic justification underlying a state's claims upon a particular value being taxed. *Oklahoma Tax Commission*, 514 U.S. at 185, 115 S.Ct. 1331. A tax that possesses external consistency will not reach beyond the value that is fairly attributable to the economic activity within the taxing state. *Id.* As noted above, the external consistency of the flat-fee option is not at issue here.

> merce at the mercy of those remaining States that might impose an identical tax."

Oklahoma Tax Commission v. Jefferson Lines, Inc., 514 U.S. 175, 185, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) (emphasis added).

Here, applying the internal consistency test, we discern no apportionment problem under the *Complete Auto Transit* analysis. The flat-fee option is aimed at operations that take place primarily in Oregon. If viewed as a tax, it is one imposed upon an activity that takes place exclusively within this state's borders. The flat fee does not tax an interstate truck's entry into this state, nor does it tax transactions spanning multiple states. As a result, if every state replicated Oregon's flat-fee tax option under the same terms, we cannot hypothesize a scenario where the interstate commerce in logs, sand and gravel, or wood chips would be subject to multiple taxation or could be viewed as one state's attempt to take more than its fair share of taxes from transactions involving those commodities.

That said, however, the remaining issue under the test set out in *Complete Auto Transit* is perhaps the most important: Does the flat-fee option at issue here nevertheless discriminate against interstate commerce? In concluding that it did, the Court of Appeals essentially melded the concepts of apportionment and discrimination together and assumed that, just as hypothetical projections could be used to show malapportionment under the internal consistency test, similar hypothetical projections could also be used to infer discrimination. Indeed, on review, plaintiffs assert that no record evidence is needed to prove that the flat-fee option is discriminatory here. Plaintiffs argue that the flat-fee option creates a forbidden incentive for trucking companies that do business in Oregon and elsewhere to concentrate their operations within this state; *Scheiner*, they contend, illustrates that

such incentives alone are enough to violate the Commerce Clause.

In any event, plaintiffs contend that the record in this case clearly establishes discrimination in practical effect. Plaintiffs point in particular to trial court findings that show, according to a study done in 2000, that sand and gravel haulers utilizing the flat-fee option paid, in the aggregate, almost $300,000 less than they would have paid under the weight-mileage alternative, while log haulers using the flat fee realized a similar savings of over $1 million. Noting that the flat-fee option is utilized almost solely by Oregon-based motor carriers that operate predominately or exclusively within the state, they argue that, as with all flat highway taxes, the flat-fee option inevitably will cost state-based, heavy users of Oregon's highways less per mile than the alternative weight-mile tax will cost interstate users who have less occasion to use Oregon roads. That result, they maintain, is inherently discriminatory. Those propositions, however, are incorrect for several reasons.

First, the Supreme Court has never viewed hypothetical possibilities, standing alone, as sufficient to constitute unconstitutional discrimination for Commerce Clause purposes:

> "On the contrary, we repeatedly have focused our Commerce Clause analysis on whether a challenged scheme is discriminatory in 'effect,' and we have emphasized that 'equality for the purposes of * * * the flow of commerce is measured in dollars and cents, not legal abstractions.' "

Associated Industries of Missouri v. Lohman, 511 U.S. 641, 654, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994) (internal citations omitted). Therefore, aside from laws discriminating against interstate commerce on their face, *see Fulton Corp. v. Faulkner*, 516 U.S. 325, 331, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996) ("[s]tate laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.'"), issues

involving discrimination against interstate commerce must involve "substantial distinctions and real injuries." *Lohman*, 511 U.S. at 654, 114 S.Ct. 1815 (*quoting Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481, 52 S.Ct. 631, 76 L.Ed. 1232 (1932)). The flat-fee option here, of course, does not facially discriminate against interstate commerce. Interstate and intrastate operations alike are free to either pay the weight/mile tax or the flat fee if they haul commodities covered by ORS 825.480. In short, eligibility for the flat fee is determined solely by the commodities hauled, not by the location of the carrier.

Second, plaintiffs' assertion that the Supreme Court's finding of discrimination in *Scheiner* was not a fact-based determination misapprehends the record that was before the Court in that case. At issue in *Scheiner* were two different Pennsylvania flat-tax schemes. 483 U.S. at 273-75, 107 S.Ct. 2829. Both were levied on all commercial trucks operating in the state in return for the privilege of using the state's highways. The Court noted that, facially, the taxes did not discriminate between in-state and out-of-state trucks in allocating tax burdens. *Id.* at 281, 107 S.Ct. 2829. Based on the evidence before it, however, the Court found that the Pennsylvania-based trucks subject to the flat taxes traveled approximately five times as many miles within Pennsylvania as did their out-of-state counterparts. *Id.* at 276, 107 S.Ct. 2829. Correspondingly, the Court found that, based on the record before it, the cost per mile of those taxes was approximately five times as high for out-of-state trucks as for local vehicles. *Id.* It was that evidentiary record that rendered the Pennsylvania taxes "plainly discriminatory," *id.* at 286, 107 S.Ct. 2829, not, as plaintiffs suggest, a hypothetical construct.

Here, in contrast, plaintiffs present no evidence of an actual burden placed on interstate commerce by Oregon's flat-fee option, or any instance where use of the flat fee has, in fact, discriminated against interstate commerce. Plaintiffs

point only to the aggregate savings realized under the flat fee as evidence of discriminatory effect. Unlike the plaintiffs in *Scheiner*, however, plaintiffs do not break those figures down between in-state and out-of-state trucking operations, or otherwise show how the aggregate savings serve to set the two groups apart. As a result, to find discrimination against interstate commerce in this case, we would be forced to assume that out-of-state trucking operations somehow had been denied access to benefits otherwise available to intrastate trucking firms and, therefore, had not contributed to the aggregate savings figures found by the trial court. Nothing in the record, however, supports that finding.[10] Consequently, there is nothing to show that the flat-fee option before us effectively has created an unconstitutionally protected trade area that prefers local commerce over interstate commerce.

Finally, the Supreme Court's recent decision in *American Trucking Associations, Inc. v. Michigan Public Service Commission*, ___ U.S. ____, 125 S.Ct. 2419, 162 L.Ed.2d 407, effectively refutes plaintiffs' argument regarding the general discriminatory effect of locally focused flat fees. At issue in *Michigan Public Service Commission* was a $100 dollar [*sic*] annual state fee levied on all trucks in Michigan making intrastate deliveries. The primary plaintiff in that case, American Trucking Associations, Inc.--the same primary plaintiff in the case now before this court-argued, much

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[10] The record, in fact, suggests the opposite. As the trial court noted in its findings of fact, out-of-state sand and gravel carriers accounted for only 13.33 percent of Oregon's total flat-fee sand and gravel mileage logged during 2000. At the same time, those same out-of-state carriers garnered 31 percent of the overall savings attributed to sand and gravel haulers as a whole. Translated into savings-per-mile, the out-of-state haulers saved an average of four cents per mile compared to weight-mile taxpayers, while in-state sand and gravel carriers saved an average of 1.5 cents per mile.

as it does here, that the fee in question was discriminatory because trucking companies that worked solely within Michigan would drive far more miles within the state than their counterparts that also made interstate deliveries, thereby obtaining a greater cost-per-mile benefit from the fee than the interstate haulers. Those financial incentives, the plaintiffs argued, would exert an impermissible "hydraulic pressure" on out-of-state truckers to concentrate their hauling in Michigan. The Supreme Court rejected that argument, however, concluding, as the Michigan Court of Appeals had pointed out, that, without more, the record contained little, if any, evidence of a significant practical burden on interstate commerce. *Id.* at 2423-24, 125 S.Ct. 2419.

The same is true here. If nothing else, *Michigan Public Service Commission* makes clear that plaintiffs cannot rely on hypothetical assertions to establish the existence of discriminatory economic effects; plaintiffs must demonstrate actual discrimination. If plaintiffs' arguments to the contrary were well-taken, not only would the Supreme Court have reached a different outcome in *Michigan Public Service Commission*, but virtually every uniformly assessed local fee would be in jeopardy if it touched some aspect of interstate commerce. That, of course, is not the aim of the Commerce Clause. *See, e.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-24, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (Dormant Commerce Clause does not seek "to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business."). Having been presented with no evidence of discrimination or malapportionment in this case aside from plaintiff's hypothetical projections, we cannot conclude, on this record, that the flat-fee option at issue here violates the Commerce Clause.

The decision of the Court of Appeals pertaining to non-farm-use carriers is reversed, the remainder is otherwise affirmed, and the judgment of the circuit court is affirmed.

APPENDIX B

Court of Appeals of Oregon.

AMERICAN TRUCKING ASSOCIATIONS, INC., a District of Columbia corporation; CRST, Inc., an Iowa corporation; USF Reddaway, Inc., an Oregon corporation; Kenneth E. Mansigh Trucking, Inc., a Washington Corporation; and Veneer Chip Transport, Inc., a Washington corporation, on behalf of themselves and all other similarly-situated weight-distance taxpayers, Appellants,

v.

STATE of Oregon, Department of Transportation and Director Grace Crunican, Department of Transportation, Respondents, and AAA Oregon/Idaho, an Oregon corporation, Intervenor-Respondent.

00C-16242; A117694.

Argued and Submitted Oct. 15, 2003.

Decided April 28, 2004.

Before Edmonds, Presiding Judge, and Wollheim and Brewer, Judges

EDMONDS, P.J.

Plaintiffs, the American Trucking Associations, Inc., and several individual trucking companies, assert that two aspects of the manner in which the state of Oregon taxes heavy trucks that use its highways violate the dormant Commerce Clause of the federal constitution. Those aspects are the flat fee options for certain commodities and the farm truck fuel tax; we describe them in detail below.[1] Plaintiffs sought a declaratory judgment, an injunction, and a refund of taxes

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[1] The tax court's jurisdiction does not extend to disputes over motor carrier taxes. ORS 305.410(1)(g). The Marion County Circuit Court therefore had jurisdiction of this case.

paid. Defendants are the State of Oregon, the Oregon Department of Transportation, the department's director, and intervenor-defendant AAA Oregon/Idaho. The trial court held in favor of defendants and dismissed the action.[2] We reverse as to the flat fee options and affirm as to the farm truck fuel tax.

We state the facts as we find them on de novo review, which is generally consistent with the trial court's findings.[3] However, we draw our own legal conclusions from those facts. The primary method under which Oregon taxes heavy trucks that use its highways is a weight-mile tax. ORS 825.450-825.555. Under that tax, a trucking carrier pays a rate for each mile that its trucks operate on the state's public highways. The tax is based on the weight that the carrier declares to be the truck's maximum legal weight; the higher the declared weight, the higher the per-mile tax for that truck. ORS 825.474-825.476.[4] A truck that pays the weight-mile

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[2] The trial court dismissed the action rather than entering a declaration of the parties' rights. Although the parties do not raise the point, that action was erroneous. "If there is a justiciable controversy, the plaintiff is entitled to a declaration of its rights, even if that declaration is directly contrary to what it believes its rights to be." *Beldt v. Leise*, 185 Or.App. 572, 576, 60 P.3d 1119 (2003). On remand, the trial court should enter a judgment that declares the parties' rights on the issues in dispute.

[3] The parties assume that a declaratory judgment action is legal in nature and that we review the trial court's findings for any evidence to support them. However, a declaratory judgment action may be either legal or equitable, depending on the nature of the case and the relief sought. *Ken Leahy Construction, Inc. v. Cascade General, Inc.*, 329 Or. 566, 571, 994 P.2d 112 (1999). In this case, the relief that plaintiffs seek is primarily equitable, and our review is *de novo*. ORS 19.415(3) (2001).

[4] For heavier trucks the number of axles may also affect the amount of the tax; those details are not relevant to the issues in this case.

tax does not pay the fuel tax that the state charges other vehicles and may take any fuel tax paid as a credit against the weight-mile tax. ORS 825.486. A carrier must maintain records of the declared weights of its trucks and the miles that they travel in order to make the required reports and calculate the amount of tax owed.

Plaintiffs do not question the constitutionality of the weight-mile tax itself. Rather, they attack two exceptions to it. The first exception concerns the flat fee options provided in ORS 825.480 for certain commodities. That statute gives carriers of three categories of commodities--logs, sand and gravel carried in dump trucks, and wood chips--the option to choose to pay a flat fee rather than the weight-mile tax. ORS 825.480(1), (4), and (5). For each commodity, the legislature established the fee at an amount that it believed to be identical to what a truck of the same weight carrying that commodity would pay in weight-mile tax if it operated as many miles per year as an average truck that carried that commodity. The calculations are based on the assumption that the truck in question operates entirely in Oregon. The flat fee option is available to carriers who are located in Oregon or any other state. The legislature has adjusted the amounts a number of times in order to reflect changes in the average mileage and in the weight-mileage rates since it originally adopted the flat fee options. If a carrier elects a flat fee option, it must do so for all the trucks in its fleet that carry that commodity, and it may make that election only once per year. ORS 825.480(2). A carrier that chooses to pay a flat fee must still report the mileage that it travels on public highways, OAR 740-055-0120; however, because those reports do not affect the taxes that the carrier pays, the state does not audit them.

Trucks carrying commodities that have a flat fee option are more likely than trucks carrying other commodities to use non-public roads for significant portions of their trips, to use lesser-traveled public roads, and to make multiple short journeys. All of those factors make it more difficult for carriers

to keep the records that the weight-mile tax requires and for the state to enforce the tax. Flat fee carriers also tend to be small operators, for whom record-keeping is especially burdensome. Thus, one purpose of the flat fee option is to ease the burden on both the carriers and the state of administering and enforcing the weight-mile tax.

Although the legislature intended the flat fee options to be revenue neutral, they are not, at least for haulers of logs or of sand and gravel. The best estimates, based on data that are not fully reliable, are that, for the most recent period for which figures were available at the time of trial, wood chip carriers who chose the flat fee option as a group paid $27,315.75 more than they would have paid under the weight-mile tax, while sand and gravel carriers paid $276,535.86 less and log carriers paid $1,164,585.86 less. For sand and gravel carriers, the underpayments are equivalent to 1.34 cents per mile, while for log carriers they are equivalent to 1.9 cents per mile. For purposes of comparison, the average profit margin in the trucking industry is 3 cents per mile.

The above evidence has several implications. The structure of the taxing system makes it probable that carriers that choose the flat fee options will, as a group, pay less than if they paid the weight-mile tax. Only a carrier that expects to save money will choose to pay a flat fee. Although the reduced record-keeping and reporting costs will produce some savings to the carrier, the primary benefit that the options provide is to reduce the total tax bill of a carrier whose trucks operate for more miles than the presumed average that the legislature used to calculate the amount of the flat fee.[5] The fact that very few wood chip carriers chose the flat fee, while

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[5] A carrier who chooses the flat fee must pay the weight-mile tax when its trucks carry commodities that do not qualify under the option that the carrier chose.

many log and sand and gravel carriers did so, supports that point. The few wood chip carriers who chose the option actually paid more on average than they would have under the weight-mile tax; that fact suggests that it is unusual for a truck carrying wood chips to exceed the presumed annual mileage. On the other hand, many carriers who carry the other flat fee commodities chose the flat fee and, overall, experienced substantial savings as a result. The implication is that many trucks carrying those kinds of commodities exceed the presumed annual mileage.

The second exception to the weight-mile tax that is in issue in this case is the exemption for trucks that qualify for registration as farm vehicles. To qualify, a truck must be owned by the owner or renter of a farm that actually produces agricultural products or livestock in sufficient quantities to require the use of a truck. ORS 805.310. The owner can use the truck only for limited purposes that involve hauling the farmer's products or livestock; hauling supplies, equipment, or material to be consumed on the farm; or hauling similar products for another farmer on a bona fide exchange of labor basis. ORS 805.390. A qualified vehicle does not pay the weight-mile tax but instead pays the state's standard fuel tax based on gallons of fuel purchased, which in most circumstances will result in a substantial cost savings to the farmer. Farm vehicles may carry commodities that would otherwise be carried by commercial carriers, who would pay the weight-mile tax. The fuel tax option is available to trucks that are located in Oregon or any other state.

Plaintiffs argue that these statutory exceptions to the weight-mile system for taxing heavy trucks violate the Commerce Clause of the federal constitution, Article I, section 8. That clause authorizes Congress, among other things, to "regulate Commerce * * * among the several States [.]" In *Cooley v. Board of Wardens of Port of Philadelphia et al.*, 53 U.S. (12 How) 299, 13 L.Ed. 996 (1851), the Supreme Court interpreted the Commerce Clause as doing more than author-

izing Congressional action; it also places limitations on a state's ability to regulate or otherwise interfere with interstate commerce even in the absence of legislation. As the Court more recently described it, the Commerce Clause "'by its own force created an area of trade free from interference by the States.'" *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977), quoting *Freeman v. Hewit*, 329 U.S. 249, 252, 67 S.Ct. 274, 91 L.Ed. 265 (1946). That aspect of the Commerce Clause is known as the "dormant Commerce Clause" because the clause limits state action by its very existence. Among other things, the dormant Commerce Clause prohibits a state from taxing interstate commerce in a way that provides a competitive advantage to local businesses. *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 269, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987).

The issues in this case concern the application of the dormant Commerce Clause to Oregon's taxation of truckers involved in interstate commerce. The United States Supreme Court has used a number of tests over the years to determine when a state tax violates the dormant Commerce Clause, and the tests have not necessarily been consistent. However, since *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), the Court has developed an approach that it continues to use. In *Complete Auto Transit, Inc.*, the Court held that it will sustain

> "a tax against [a] Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

430 U.S. at 279, 97 S.Ct. 1076. In this case, the issues involve the "fair apportionment" and "nondiscrimination" elements of the test; plaintiffs do not assert that there is no

substantial nexus between their activities and Oregon or that the highway taxes are not fairly related to the services that the state provides. In other words, plaintiffs argue that the exceptions to Oregon's weight-mile tax place interstate commerce at a disadvantage when it competes with intrastate commerce.

In *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983), the Court discussed how to determine when a tax is fairly apportioned and when it is nondiscriminatory. Those concepts are closely related. The Court held that "fair apportionment" requires the tax to be both internally and externally consistent. As applied to the state taxation of the income of a unitary business, which was the issue in *Container Corp.*, "internal consistency" means that, if every jurisdiction applied the same tax, no more than all of the business' income would be taxed. 463 U.S. at 169, 103 S.Ct. 2933. In a more recent case the Court described the concept more fully:

> "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. *This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.* A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax."

Oklahoma Tax Comm'n. v. Jefferson Lines, Inc., 514 U.S. 175, 185, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) (emphasis added).

The internal consistency test thus[] does not look at the actual effect of the tax on interstate commerce but at whether it would, in theory, place interstate commerce at a disadvantage if all states adopted the identical tax. In contrast, "external consistency" means that the factor or factors used in the apportionment formula must actually reflect how income is generated. *Container Corp.*, 463 U.S. at 169-70, 103 S.Ct. 2933. In this case, plaintiffs do not contend that "external consistency" is an issue.

"Fair apportionment" is closely related to "discrimination in effect," if not in intent.[6] "Internal consistency" appears to be the primary test for determining whether a tax discriminates against interstate commerce in its effect. For determining both fair apportionment and discrimination in effect, the issue is whether the tax, if universally applied, would impermissibly interfere with free trade. See *Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984) (tax that unfairly apportions income from other states is a form of discrimination against interstate commerce). With regard to interstate commerce, the prohibition of discrimination does not require much more than that the test of "fair apportionment" be satisfied. *Container Corp.*, 463 at 170-71, 103 S.Ct. 2933.

Plaintiffs rely heavily on *Scheiner* with regard to the application of the "fair apportionment" and "discrimination in effect" tests to the flat fee and farm truck fuel tax exceptions

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[6] Proof of unconstitutional discrimination does not require proof that the state had a discriminatory purpose. It is sufficient to show that the effect of its actions was discriminatory. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).

to the weight-rule tax. In that case, the Supreme Court held that two flat fees that the state of Pennsylvania imposed on trucks operating within its borders violated the dormant Commerce Clause. Those fees were, first, a fee of $25 that the state charged between 1980 and 1982 for an identification marker that had to be affixed to every motor carrier vehicle. The state deemed the fee to be part of the registration fees for Pennsylvania-registered vehicles, thus making them exempt from it. In 1982, the state reduced the marker fee to $5, which approximated the cost of administering the marker program. At the same time, it enacted a second flat fee, a tax of $36 per axle for every vehicle that operated more than 2,000 miles in Pennsylvania, and it reduced registration fees for vehicles registered in the state by the amount of the axle tax. As a result, Pennsylvania-registered vehicles paid the same amount before the change as afterwards, but interstate trucking companies had their taxes increased. The lead plaintiff in this case and several trucking companies challenged the Pennsylvania fees as violations of the Commerce Clause.

The decisive question for the Court in *Scheiner* was "do the methods by which the flat taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the Commerce Clause?" *Scheiner*, 483 U.S. at 282, 107 S.Ct. 2829. In answering that question, the Court found dispositive those cases that made it clear that the Commerce Clause "prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States." *Id.* Pennsylvania's method of taxing failed that standard because it did not treat Pennsylvania-registered vehicles and vehicles from other states consistently. It would undoubtedly deter interstate commerce for every state to impose similar fees for the privilege of making commercial entries into its territory. *Id.* at 284, 107 S.Ct. 2829. In that

situation, a trucker that operated in several states would pay several fees, one to each state, while a trucker that operated solely in Pennsylvania would pay only one fee, to Pennsylvania. Consequently, the taxing scheme had "a forbidden impact on interstate commerce because it exert[ed] an inexorable hydraulic pressure on interstate businesses to ply their trade within the state that enacted the measure rather than 'among the several states.'" *Id.* at 286-87, 107 S.Ct. 2829. For that reason, a state's imposition of an unapportioned flat tax discriminates against interstate commerce. *Id.* at 292, 107 S.Ct. 2829. Flat taxes are constitutionally permissible only "when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user fee schedule would pose genuine administrative burdens." *Id.* at 296, 107 S.Ct. 2829.

As defendants point out, the flat fee options at issue in this case differ from the flat fees in *Scheiner* because they are optional in nature. Carriers who do not choose the flat fee option will pay a weight-mile tax that is properly apportioned and that does not discriminate. In addition, the flat fee option applies only to a limited number of commodities; for that reason alone, most carriers operating in Oregon, both those that operate primarily interstate and those that operate primarily intrastate, pay the weight-mile tax. However, while those facts may limit the discriminatory effect of the flat fees, they do not necessarily make them constitutional. It remains possible that the very act of choosing the flat fee will encourage a carrier to focus on intrastate rather than interstate commerce.

In deciding this kind of issue, the Supreme Court's case law does not rely on the specific evidence in a specific case as the foundation for its conclusions concerning a particular tax. Rather, it focuses on the structure of the tax at issue, something that in this case can readily be perceived by describing hypothetical situations. Here, the focus is on carriers whose trucks travel more miles in Oregon than the

amount that the legislature presumed.[7] As one example, assume that the weight-mile tax for a particular truck is ten cents per mile, that the legislature presumes that the average truck carrying the commodity involved will travel 40,000 miles per year in Oregon, and that the legislature has therefore set an alternative flat fee at $4,000 per year.[8] Carrier A has trucks that actually travel 50,000 miles entirely in Oregon; it elects to pay the flat fee and therefore pays $4,000 per truck, or an effective rate of 8 cents rather than 10 cents per mile. Carrier B has trucks that also operate 50,000 miles, but they operate half the time in Oregon and half the time in other states with identical tax systems. Carrier B would lose money by electing to pay the flat fee in any state that has such a taxing scheme because the flat fee is calculated on an amount of mileage greater than its trucks will travel in any one state. Thus, economic necessity requires carrier B to elect to be taxed on the basis of its mileage, and its total taxes will be $5,000 per truck, or an effective rate of 10 cents per mile. Such a taxing scheme favors intrastate carriers over interstate carriers. Any other hypothetical situation, using any other figures for an unapportioned flat fee option, will show a similar malapportionment and discriminatory effect as to interstate carriers that exceed the presumed average mileage.

In this hypothetical situation, the flat fee option will both exert pressure on the interstate carrier to change its operations to focus on intrastate business and will discriminate

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[7] Because a carrier that expects its trucks to operate in Oregon for fewer than the presumed number of miles has an economic incentive to choose to pay the weight-mile tax, those who choose the flat fee option will usually expect to operate more than the presumed mileage.

[8] The actual tax system involves additional factors. Including them would make that hypothetical more complex but would not affect the conclusions that we draw from it.

against the interstate carrier if it does not do so. Only by focusing on intrastate business can the carrier pay the lower tax rate that similarly situated intrastate carriers are able to pay. The flat fee options, thus, discriminate between interstate and intrastate carriers whose businesses differ only because of their relationship to state boundaries, and the discrimination operates to the detriment of the interstate carrier. The flat fee options do not apportion the tax burden among the states where the interstate carrier operates, and they therefore fail the "internal consistency" test.

Defendants counter that the flat fee is necessary because of the difficulty of administering the weight-mile tax. They argue that carriers of the affected commodities frequently travel off state highways, use less-traveled highways where the costs of enforcing the tax may exceed the amounts received, and make multiple short trips that make record-keeping difficult. However, as plaintiffs point out, many carriers of the same commodities do not choose the flat fee, and the administrative problems that defendants describe also exist as to them. The flat fee option cannot fully resolve those problems, and defendants have not demonstrated that the flat fee options are the only practicable way of collecting the taxes in issue.

The trial court took a different legal approach from what we have described, an approach that defendants endorse. The court relied on the general principles for determining when a state regulation violates the dormant Commerce Clause that the Court described in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970):

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

The trial court applied those principles and concluded that there was insufficient evidence to show that the flat fee options had more than an "incidental" effect on interstate commerce. It also held that the system was internally consistent because the evidence showed that out-of-state carriers who paid the flat fees benefited disproportionately to in-state carriers who paid those fees. In addition, it pointed out that flat fee commodities generally travel relatively short, mostly in-state distances and that, as a group, wood chip carriers who chose the flat fee paid more than if they had paid the weight-mile tax.

Our understanding of the applicable case law leads us to the conclusion that the Supreme Court does not apply a *Pike*-type balancing test to the taxation of interstate commerce. Rather, it holds that any malapportionment or discrimination will invalidate the challenged tax. "[W]here simple economic protectionism is effected by state legislation, a stricter rule of invalidity has been erected." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). Thus, the Court will base a finding that state legislation constitutes economic protectionism on either a discriminatory intent or a discriminatory effect. *Id.* As we previously discussed, the Court has also made it clear that it is the inherent tendency of a tax, not the effects that the tax has actually produced, that matters for the "internal consistency" test. A tax that fails that test is both malapportioned and discriminatory in effect.

In addition, what matters under the dormant Commerce Clause is not where a carrier is based but where it does business; a Washington carrier that pays a flat fee in Oregon would have the same economic pressure to focus on Oregon intrastate business that exists for an Oregon carrier that chose that option. The Oregon flat fee options provided in ORS 825.480 create a disproportionate pressure that the dormant Commerce Clause forbids. As we have illustrated by our hypothetical example, that exception to the weight-mile tax

necessarily violates the commerce cause because it puts interstate carriers at a disadvantage when compared with intrastate carriers.

Defendants also argue that the flat fee options are a use tax that the state collects to pay for specific services--constructing and maintaining highways--that it provides. As such, they argue, they are not subject to the fair apportionment and anti-discrimination requirements that we have discussed. Defendants rely on *Evansville Airport v. Delta Airlines*, 405 U.S. 707, 716-17, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972), in which the Court upheld a fee of one dollar charged to each airline passenger for the use of the airport. The problem with that argument is that the flat fees involved in *Scheiner* were also designed to pay for Pennsylvania's highways; the Court distinguished *Evansville* on the ground that those fees discriminated against out-of-state vehicles by subjecting them to a much higher charge per in-state mile and did not purport to approximate failure [*sic*] the cost or value of using Pennsylvania's roads. *Scheiner*, 483 U.S. at 290, 107 S.Ct. 2829. In essence, the fees in *Evansville* were self-apportioning and were directly tied to the services provided, while the flat fees at issue in *Scheiner* were not apportioned and thus were not true use taxes. The same is true of the flat fee options at issue in this case. Once a carrier chooses to pay the flat fee, the amount of its taxes is set at a specific amount that is not related to the miles traveled or the services that the state actually provides. While the weight-mile tax may well be a use tax, the flat fee options are not.

Defendants cross-assign error to the trial court's finding that carriers of general commodities and carriers of flat fee commodities are similarly situated for purposes of the dormant Commerce Clause. We do not need to decide that issue. Carriers of flat fee commodities who are not able to take advantage of the flat fee options are sufficiently similarly situated to carriers of those commodities who are able to do so to state a claim under that clause, so the issue does not af-

fect plaintiffs' standing. The parties appear to believe that this issue may affect the remedies on remand; in particular, defendants are concerned that invalidating the flat fee options may lead to invalidating the entire weight-mile tax. In *Bacchus Imports*, for example, the Court invalidated the Hawaii liquor tax because it unconstitutionally exempted certainly locally-produced liquors. However, in *Bacchus Imports*, the exemption was absolute; the liquors in question were not taxed at all. In contrast, the flat fee options in this case are alternatives to the weight-mile tax; invalidating the flat fee options simply means that all carriers are subject to the underlying weight-mile tax. Carriers who carried flat fee commodities and who paid the weight-mile tax rather than a flat fee may be entitled to an appropriate remedy on remand, but the nature of that remedy will not depend on whether the carriers involved competed in the same market with carriers of non-flat fee commodities. Thus deciding the cross-assignments of error will not have a practical effect on the parties' rights on remand.

Next, we turn to the farm truck fuel tax exception in ORS 805.310. Plaintiffs point out that non-farm carriers carry many of the commodities that farmers carry and that farm trucks benefit from paying the fuel tax. They argue that farm trucks are therefore in competition with non-farm carriers and receive discriminatory preferences because the former pay lower taxes. The parties dispute a number of factual issues related to that argument, including whether farm trucks and non-farm carriers compete in the same market. Those disputes are irrelevant to the validity of the tax. As defendant AAA Oregon/Idaho points out, plaintiffs fail to show that the fuel tax discriminates between interstate and intrastate carriers. Under the fuel tax exception for farm trucks, it does not matter where a farm truck is based. To the extent that it does business in Oregon and qualifies as a farm vehicle, it will pay the fuel tax instead of the weight-mile tax. If every state adopted the fuel tax exception, there would be no malappor-

tionment or discrimination between interstate and intrastate carriers. Both kinds of carriers would receive an equivalent economic benefit from the exception.

The dormant Commerce Clause prohibits discrimination between interstate and intrastate commerce; it does not prevent the legislature from providing benefits for certain economic groups if those benefits do not involve such discrimination. The fuel tax satisfies the tests that the Court established in *Complete Auto Transit*. If every state adopted the same tax system, farm vehicles would pay the same taxes whether they operated intrastate or interstate. Thus, the tax is internally consistent, and it is therefore fairly apportioned and does not discriminate in effect. There is also no evidence of a discriminatory intent. The tax applies to an activity with a substantial nexus to Oregon and is fairly related to the services that Oregon provides. We conclude that the fuel tax exception for farm vehicles embodied in ORS 805.310 does not violate the dormant Commerce Clause.

Plaintiffs also argue that the fuel tax exception violates the Equal Protection Clause of the Fourteenth Amendment. The trial court held that there was no equal protection violation because the fuel tax had the legitimate purpose of protecting agriculture. Plaintiffs respond that a state cannot legitimately promote its local economy through a tax system that is designed to favor domestic industry at the expense of industry outside of the state. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985). The problem with that argument is that the fuel tax exception does not discriminate between Oregon and out-of-state farmers. Unlike the higher tax for out-of-state insurance companies that was at issue in *Metropolitan Life Ins. Co.*, the exception favors agriculture in general, not agriculture in Oregon. Because the issue does not involve a protected class, plaintiffs must show that there is no rational relationship between the exception and a legitimate state policy. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58,

108 S.Ct. 2481, 101 L.Ed.2d 399 (1988). The legislature's decision to benefit farmers *when it adopted the fuel tax exception* for farm vehicles was a policy choice for it to make. We see nothing irrational about the means that it chose to achieve its purpose. Thus, we agree with the trial court that the exception does not violate the Equal Protection Clause.

Because of its decision upholding the validity of both provisions, the trial court did not consider the remedies for the violations that we have found. On remand, it shall enter an appropriate declaratory judgment that is consistent with our rulings in this opinion, that resolves all of the parties' contentions, and that awards any appropriate relief.

Reversed and remanded with instructions to enter declaratory judgment declaring the flat fee options unconstitutional, otherwise resolving the parties' contentions, and awarding any appropriate relief; otherwise affirmed.

APPENDIX C

February 15, 2002

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RE: *ATA et. al. v. State of Oregon et. al. & AAA, Intervenor*

Marion County Circuit Court Case No. OOC-16242

Dear counsel:

As you know, this case was tried before me December 10 through December 20, 2001. Simultaneous written closing arguments were submitted on January 18, 2002. This letter opinion sets forth my findings of fact and conclusions of law.

FINDINGS OF FACT

I adopt the stipulated findings of fact submitted by the parties on December 10, 2001, as corrected on January 9, 2002. In addition, I make the following findings of fact:

Farm Vehicles

1. No plaintiffs own, rent, or operate farms. (The court draws this inference from the lack of any evidence that plaintiffs do so).

2. When farm vehicles are used other than for the purposes allowed by ORS 805.390, they are not exempt from the weight-mile tax. ORS 825.024(1)(a).

3. Federal law exempts farm vehicles that run less than 7,500 miles from highway use taxes. 26 USC §4483(d)(5).

Competition

4. Generally speaking, it is most cost-effective to haul commodities in vehicles that are specialized for the specific commodity. Hence, logs, sand and gravel, and wood chips are usually each hauled in trucks specifically adapted for those purposes. Likewise, general commodities such as furniture are usually hauled in trucks adapted for that purpose. (Testimony of Jim Bauer, Dennis Williams, and Barry Mammano).

5. Because trucking companies generally do not get paid for empty miles, trucking companies have increased efforts to obtain "back hauls," which are loads the truck can haul back to its original departure point. (Testimony of David Berry, Troy Hutchins, Ron Borges, John Bredeson, and Martin Labbe).

6. The need to procure back hauls has led the trucking industry to place greater emphasis on versatile equipment, which can be used to haul a variety of commodities. Such equipment is being increasingly developed. (Testimony of David Berry, Troy Hutchins, Ron Borges, John Bredeson, and Martin Labbe).

7. While the use of such equipment is generally less cost-effective than the use of specialized equipment, the increased revenue that can be obtained through the increased availability of back hauls with versatile equipment does, at times, make it economically viable to use versatile equipment. Therefore, the practice of using the same vehicle to haul, for example, logs in one direction and plywood in the other direction is increasing. (Testimony of David Berry, Troy Hutchins, Ron Borges, John Bredeson, and Martin Labbe).

8. A survey of Oregon truckers revealed the following:

   a. Approximately 14 percent of respondents who carry general freight truckload also carry flat fee commodities. (Exhibit 552).

   b. Approximately 7 percent of respondents who carry general freight less-than-truckload also haul flat fee commodities. (Exhibit 552).

   c. Approximately 24 percent of respondents who haul other specialized in [*sic*] general commodities also haul flat fee commodities. (Exhibit 552).

   d. Approximately 26 percent of respondents who carry sand and gravel also haul general (non-flat fee) commodities. (Exhibit 552).

   e. Approximately 8 percent of respondents who carry logs also haul general (non-flat fee) commodities. (Exhibit 552).

   f. Approximately 21 percent of respondents who carry wood chips also haul general (non-flat fee) commodities. (Exhibit 552).

   g. Approximately 7.3 percent of respondents haul both flat fee and general (non-flat fee) commodities. (Exhibit 553).

(Testimony of Professor Wilson).

9. If a trucking company sees a profitable opportunity to haul a commodity for which the company does not have the necessary equipment, equipment is readily available to rent or lease. In the alternative, the company could sub-contract with an independent owner-operator who has the necessary equipment. This is a widely used alternative in the trucking industry. (Testimony of David Berry, Lloyd Ludtke, Ron Borges, John Bredeson).

10. There are no regulatory barriers which would prevent a general commodities hauler from hauling flat fee commodities or vice versa. (Testimony of David Berry).

Oregon's Flat Fee Studies,

11. Off-road miles are not taxable. (Testimony of Dr. Casavant).

12. Oregon flat fee taxpayers file monthly reports with ODOT. The reports require the taxpayer to list, for each vehicle, its beginning and ending odometer readings, and its total miles operated. In an additional, separate column, the form asks the taxpayer to list the vehicle's Oregon taxable miles for the month. (Exhibit 80).

13. In 1995, the PUC conducted a flat-fee study, based on data reported in 1993. Believing that its records only contained total miles for flat fee taxpayers, the PUC conducted a survey of flat fee carriers, asking them to estimate their out-of-state and off-road miles. The PUC then applied the percentages of taxable miles obtained from the survey respondents to its overall data from flat fee carriers. The study concluded that wood chip carriers paid $42,761.00 less in flat fee taxes than they would have paid in weight mile taxes;

log carriers paid $141,450.00 more in flat fee taxes than they would have paid under weight-mile; and sand and gravel carriers paid $242,891.00 less in flat fee taxes than they would have paid under weight-mile. (Exhibit 33).

14. In 1997, ODOT assumed responsibility for conducting the flat fee study. The study was initially conducted using the same methodology as the 1995 study, surveying carriers and applying their reported taxable miles to reduce the total miles shown on the flat fee reports. The study used 1995 data. The study concluded that wood chip carriers paid $75,987.00 less in weight-mile taxes than they would have paid in flat fee taxes; log carriers paid $1,703,736.00 less under flat fee than they would have paid underweight-mile; and sand and gravel carriers paid $512,501.00 less under flat fee than they would have paid underweight-mile. (Exhibit 35).

15. At some point, ODOT personnel realized that the forms submitted by flat fee taxpayers actually requested them to report their taxable miles. Therefore, reducing the reported taxable miles based on survey results showing taxable miles as a percentage of total miles was a double reduction. ODOT therefore re-did the 1997 study under the "take the taxpayer at their word" approach, using reported taxable miles without any reduction. However, ODOT recognized that taxable miles were probably not being accurately reported, and stated in its report that this method overestimated the loss to the highway fund. Using this methodology, ODOT found that wood chip carriers had underpaid by $86,714.00 compared to weight mile taxes; log carriers had underpaid by $2,783,281.00 compared to weight mile taxes; and sand and gravel carriers had underpaid by

$596,037.00 as compared to weight mile taxes. (Exhibit 36).

16. Both 1997 studies assumed that log trucks ran 50% of their miles empty. (Exhibit 35, p. 30, Exhibit 36, p.18)

17. Because of continuing concerns as to the accuracy of the methodology used to determine the taxable miles traveled by flat fee taxpayers, the 1997 studies were not presented to the Legislature. (Testimony of Greg Dal Ponte).

18. In 1998, ODOT did an additional study using the "take the taxpayer at their word" methodology, but based on a sample of carriers instead of actual total numbers from carriers. This study used 1997 data. This study found underpayments (as compared to what weight-mile taxes would have been) of $30,130.00 for wood chip carriers; between $3,384,353.00 and $4,025,776.00 for log carriers; and between $822,854.00 and $1,335,358.004 [*sic*] sand and gravel carriers. (Exhibit 38, testimony of Greg Dal Ponte).

19. Flat fee taxpayers complained that the study was inaccurate because flat fee taxpayers consistently over-reported their taxable miles. Mr. Dal Ponte then began reviewing the flat fee reports that came in the mail. He found that most were clearly inaccurate. Many completed only the total miles traveled or the taxable miles, but not both columns, and others completed both columns but put the same number of miles in both columns; indicating that no deduction had been made for off-road or out-of-state miles. (Testimony of Greg Dal Ponte).

20. In response to the concerns of flat fee taxpayers, Mr. Dal Ponte sent a letter to a sample of flat fee taxpay-

ers explaining the difference between total miles and taxable miles, and giving the flat fee taxpayers the opportunity to amend their mileage reports. The letter notified taxpayers that: "Failure to accurately identify and subtract exempt miles from total miles on the Flat Monthly Fee Report could result in an inappropriate increase in your flat fee rate." (Testimony of Mr. Dal Ponte, Exhibit 79).

21. The responses from the carriers indicated that up to 20 percent of miles reported as taxable by log carriers should have been shown as exempt miles; up to 12 percent of miles reported as taxable by wood chip carriers should have been shown as exempt miles; and up to three percent of miles reported as taxable by sand and gravel carriers should have been shown as exempt miles. (Exhibits 41, 78, 62).

22. The 2000 flat fee study again used the "take the carrier at their word" methodology, using the taxable miles reported on the carriers' flat fee reports. This study, based on 1999 data, used a sample of carriers, as opposed to analyzing the data for every carrier (the exception is that all wood chips flat fee reports were analyzed due to their small numbers). The study concluded that wood chip carriers paid $12,853.00 more under the flat fee system than they would have paid under the weight-mile system; log carriers paid between $2,570,433.00 and $3,118,563.00 less under the flat fee system than they would have paid under weight-mile; and sand and gravel carriers paid between $145,476.00 and $469,747.00 less under the flat fee system than they would have paid under weight-mile. (Exhibit 42). Like the 1997 studies, the 2000 study assumed that log trucks ran 50% of their miles empty and 50% loaded. (Exhibit 42, p. 31).

23. ODOT's flat fee studies compared weight-mile taxpayers to flat fee taxpayers. They contained no analysis of whether the taxpayers were in-state or out-of-state. (Exhibits 33, 35, 36, 38, 42).

24. In June of 2001, the Legislature heard testimony that the flat fee studies were unreliable, including a memorandum from ODOT's Executive Deputy Director suggesting that it would be reasonable for the Legislature to make no changes based on the flat fee study. (Exhibits 524, 525, 550).

Revenue Effects of the Flat Fee Option

25. Flat fee taxpayers generally do not keep good records of taxable miles. The difference between taxable and non-taxable miles is irrelevant to them, since it will not affect their tax rate. In addition, most flat fee taxpayers are small operators for whom the recordkeeping required to track taxable and non-taxable miles would be burdensome. (Testimony of Greg Dal Ponte, Barry Mammano, Exhibit 76)

26. Although an administrative rule requires flat fee taxpayers to keep the same records as weight-mile taxpayers, ODOT does not audit flat fee taxpayers or otherwise enforce this recordkeeping requirement, because such efforts would cost ODOT money without raising any additional revenue. (Testimony of Greg Dal Ponte).

27. Despite the trend towards more versatile equipment to facilitate back hauls, it remains the case that very few log haulers have equipment which would permit them to haul logs in one direction and something else on the return trip. Therefore, most log haulers travel the return trip empty most of the time. (Testimony of Dennis Williams, Kenneth Mansigh and Barry Mammano). In addition, log haulers generally run

empty from their homes to the logging site, and from the drop site back home. Haulers often accept a job several hours away from their home, thus running substantial empty miles before beginning the job and after finishing the job, in addition to the empty miles run during the job returning from the drop site back to the logging site. (Testimony of Barry Mammano, Lloyd Ludtke).

28. Because the weight-mile tax is based on the vehicle's weight, log trucks paying under the weight-mile taxes pay a higher rate when fully loaded than when empty. (Testimony of Dr. Casavant).

29. For purposes of comparing taxes paid under the flat fee with what would have been paid under the weight-mile tax, it is reasonable to assume that log trucks run empty 55% of the time. (Testimony of Dr. Casavant).

30. Because log trucks have to travel into the woods, they run a significant percentage of their mileage off-road. Federal tax regulations governing log trucks assume up to 25% of their mileage is off-road. It is reasonable to assume that 15 percent of the total miles run by log trucks are off-road. (Testimony of Dr. Casavant).

31. It is reasonable to assume that up to 3% of miles reported by sand and gravel carriers are non-taxable miles. (Testimony of Dr. Casavant).

32. There exists the possibility that, as a result of information provided by Mr. Dal Ponte and trade industry groups, some flat fee taxpayers may have underreported their number of Oregon taxable miles, in the hope of affecting their future flat fee rates. However, I found no evidence that this has actually occurred, and I consider it unlikely to have occurred to any

meaningful degree, particularly given the uncertainty of any such tax benefit. (Testimony of Dr. Casavant). Given that Dr. Casavant's estimates of off-road and non-taxable miles are conservative in any event, this possibility does not warrant changing those estimates.

33. In calculating the revenue effects of Oregon's flat-fee option, Drs. Casavant and Lawson reviewed the flat fee reports filed by log truckers. Any form that reported a different number for total miles and taxable miles was treated as correct, and it was assumed that all taxable miles reported were actual taxable miles. 44% of the miles were therefore classified as correctly reported. Forms that included the same number for total and taxable miles were treated as incorrectly reported, because of the extreme unlikelihood that a log truck would run 100% of its miles in-state and on-road. The mileage on those forms was multiplied by 85 percent to deduct for the assumption of up to 15 percent off road miles. I find these assumptions reasonable and, if anything, favorable to the plaintiffs since, for example, they consider only off-road and not out-of-state miles for the incorrect mileage reporters, and they consider as correct reports that may have deducted only out-of-state miles from total miles as opposed to also deducting off-road miles (as Mr. Mammano testified he did). (Testimony of Drs. Casavant & Lawson, Barry Mammano).

34. In 1999, wood chip haulers paying flat fee taxes paid $12,873.05 more than they would have paid in the weight-mile taxes. Weight-mile rates were reduced effective September 1, 2000. If the 1999 rates had applied for all of the year 2000, wood chip haulers paying flat fee taxes would have paid $16,337.93 more than they would have paid in weight-mile taxes. If the 2000 rates had applied for all of the year 2000, wood chip haulers paying flat fee taxes would have

paid $49,194.62 more than they would have paid in weight-mile taxes.[1] If one uses a "blended" rate by applying 2/3 of the 1999 rate and 1/3 of the 2000 rate[2], wood chip haulers paying flat fees in 2000 paid $27,315.75 more than they would have paid in weight-mile taxes.[3] (Exhibit 563, testimony of Dr. Lawson).

35. Using 97 percent of reported miles, based on the reasoning described above, sand and gravel trucks paying flat fee taxes in 1999 paid $380,247.82 less than they would have paid in weight-mile taxes. (Exhibit 566, testimony of Dr. Lawson). In 2000, again using 97% of reported miles, and applying 1999 rates for the entire year, sand and gravel truckers paying under the flat fee paid $357,183.67 less than they would have paid under weight-mile taxes. If the 2000 rates were applied for all of year 2000, the underpayment would be $115,803.91. Applying a blended rate, using the same methodology as I did with wood chips, sand and gravel trucks paying flat fee taxes paid $276,535.86 less in 2000 than they would have paid

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[1] This uses the rates "with axles". For trucks over 80,000 pounds, the weight-mile tax rate varies based on the number of axles. Therefore, the comparison that includes axles rates most accurately approximates the weight-mile tax that would have been paid.

[2] As pointed out by Dr. Casavant, this will not result in a precise measure, because of the seasonal nature of these businesses and the timing of the change in rates. Nevertheless, I find it reasonable as a rough approximation of the actual rates in effect in 2000.

[3] I performed these calculations myself using Exhibit 563, Table 4. 66.66% x $266,771.93 (1999 rate) = $177,830.17; 33.33% x $233,915.25 = $77,963.95; total 2000 weight-mile taxes therefore would have been $255,794.12. Flat fee taxes were $283,109.87, the difference is $27,315.75.

in weight-mile taxes.[4] (Exhibit 567, testimony of Dr. Lawson).

36. In 1999, using the assumptions that 44% of miles were correctly reported, and that the remaining miles should be multiplied by 85%, and that log trucks drove 55% empty, flat fee log carriers paid $1,723,476.53 less than they would have paid under weight-mile.[5] (Exhibit 568, testimony of Dr. Lawson).

37. In 2000, again using the same assumptions, if the 1999 rates had applied all year,[6] log carriers paying under the flat fee would have underpaid by $1,505,727.71 compared to weight-mile payers. If the 2000 rates had applied all year, log carriers paying

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[4] 1999 rate w/ axles $1,959,402.55 x 66.66% = $1,306,137.74
2000 rate w/ axles $1,718,022.79 x 33.33% = $572,617.00
Blended rate $1,878,754.74 - $1,602,218.88 = $276,535.86 underpayment (Exhibit 567)

[5] I derived the following figures from Exhibit 568: the total 1999 reported miles for log trucks were 100,327,841. Assuming that 44% of those were correctly reported, 44,144,250 miles should be counted at 100%. Based on my earlier findings regarding over reporting, the remaining 56,183,591 miles should be multiplied by 85%. This results in a figure of 47,756,052.35 which, when added to the 44,144,250 miles correctly reported, results in a total figure of 91,900,302.35 miles. This, in turn, is 91.6% of the reported miles. I then applied the 91.6% to the weight-mile tax figures, using the 45% loaded and 55% empty assumption. This results in a weight-mile tax of $5,874,428.66 on the loaded miles, and $3,057,982.56 on the empty miles. The total weight-mile tax is then $8,932,411.22. Subtracting the actual flat fee taxpayers of $7,208,934.69 results in an underpayment by flat fee log carriers as compared to weight-mile taxes of $1,723,476.53 in 1999.

[6] Calculated same as 1999 calculations[.]

under the flat fee would have underpaid by $484,690.33 compared to weight-mile payers. Using a blended rate, which I find to be the most accurate approximation, in 2000 log carriers paying under the flat fee underpaid by $1,164,585.86 compared to weight-mile payers. (Exhibits 570, 572).[7]

38. I find the assumptions made by Drs. Casavant and Lawson regarding incorrect mileage reporting and

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[7] How I performed these calculations:
total miles reported 94,537,939 x 44% = 41,596,693
remaining miles = 52,941,246 x 85% = 45,000,059
total countable miles = 86,596,752 = 91.6% of reported miles

1999 loaded rates w/axles $5,916,738.31 x 91.6% = $5,419,732.29
1999 empty rates w/axles $3,145,405.23 x 91.6% = $2,881,191.19
Total 1999 w-m rate = $8,300,923.48 - $6,795,195.77 = $1,505,727.71 underpayment

2000 loaded rates w/axles $5,188,698.78 x 91.6% = $4,752,848.08
2000 empty rates w/axles $2,758,775.13 x 91.6% = $2,527,038.02
Total 2000 w-m rate = $7,279,886.10 - $6,795,195.77 = $484,690.33

These match the Exhibit 572 figures

2000 blended rate:
1999 rate $8,300,923.48 x 66.66% = $5,533,395.59
2000 rate $7,279,886.10 x 33.33% = $2,426,386.04
2000 blended w-m rate = $7,959,781.63 - $6,795,195.77 = $1,164,585.86

Plaintiffs' calculation of the blended rate, Exhibit 108, comes out slightly different. In part this appears to be because plaintiffs used 67% for the 1999 rate instead of 66.66%. There are other minor differences that I cannot explain. Plaintiffs calculate a blended rate underpayment of $1,165,400.00.

empty mileage to be more likely correct than those made by the ODOT studies. I therefore find that the figures derived from Drs. Casavant and Lawson's work are a more accurate determination of the true comparison between weight-mile and flat fee taxes than the ODOT studies. In addition, since ODOT has not yet done a study based on year 2000 data (testimony of Greg Dal Ponte), the Casavant/Lawson study is the only [*sic*] that provides data for that important year.

Effects of Flat Fee Tax on Interstate Commerce

39. The trucking industry is highly competitive. Substantial numbers of trucking companies are simply not making it. Nationwide, 3,100 trucking companies failed in 2000, and 2,500 failed in the first six months of 2001. Some companies are making profits of 4-6%. Swift, a large trucking company which pays weight-mile taxes in Oregon, has a profit margin of 5-6%. Bettendorf and Costa, two interstate trucking companies that pay weight-mile taxes in Oregon, have profit margins of approximately 4%. Nationwide, the average profit margin (which presumably reflects the companies that are failing as well as those that are doing better than average) is approximately 2%. This translates to two to three cents per mile as an average profit margin. (Testimony of David Berry, Ron Borges, John Bredeson, and Martin Labbe).

40. The savings to flat fee taxpayers hauling sand and gravel in the year 2000 averaged 1.9 cents per mile. (Exhibit 567).[8]

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[8] Savings of $276,535.86 divided by 14,555,062.43 miles.

41. The savings to flat fee taxpayers hauling logs in the year 2000 averaged 1.34 cents per mile. (Exhibits 569, 570, 572)[9]

42. Some flat fee taxpayers save more than the average amount. Others save less, or even pay more under flat fees than they would pay under weight-mile. (Testimony of Barry Mammano, Dr. Sims, Dr. Casavant, Exhibit 116).

43. Although out-of-state carriers accounted for only approximately 8.5% of miles run by flat fee sand and gravel carriers in 1999, they accounted for 48% of the total underpayment by all sand and gravel flat fee carriers in 1999. (Exhibit 565, testimony of Dr. Lawson). In the year 2000, out-of-state carriers paying flat fee taxes for sand and gravel accounted for 13.33% of the total flat fee sand and gravel mileage, but 31% of the overall underpayment by sand and gravel carriers. (Testimony of Drs. Lawson and Casavant).[10]

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[9] Underpayment $1,164,585.86 divided by 86,596,752 countable miles. Plaintiffs claim, based on their cross exam of Dr. Casavant, that the underpayment is 1.9 cents per mile. Plaintiffs derived this by taking the percentage underpayment calculated in Exhibit 108 (14.6%), and applying this to a blended per-mile rate based on a 80,000 pound truck. Not only does this method come up with a different result than my calculation, but it seems less reliable to me, for the simple reason that not all miles were traveled by 80,000 pound trucks. I believe that my method, dividing the total underpayment by the total countable miles, is the most accurate method of calculating the average actual underpayment.

[10] In response to a question from Mr. Seidman, Dr. Lawson agreed with an approximation of 15% of the mileage. However, according to her testimony, the actual mileage numbers are approximately 2 million miles for out of state sand and gravel carriers and

44. This means that in 1999, out-of-state sand and gravel carriers saved an average of 13.5 cents per mile compared to weight-mile taxpayers, whereas in-state sand and gravel carriers saved an average of 1.4 cents per mile.[11] In 2000, out-of-state sand and gravel carriers saved an average of 4 cents per mile compared to weight-mile taxpayers, and instate sand and gravel carriers saved an average of 1.5 cents per mile.[12]

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13 million for Oregon sand and gravel carriers. 2 million is 13.33% of 15 million.

[11] Here are the calculations: Using 97% of reported miles, total miles =15,952,124. Total underpayment = $380,247.82

Out-of-state carriers: 8.5% of miles =1,355,930.54
48% of savings = $182,518.95
savings per mile (savings ÷ miles) =13.5 cents/mile (maximum rate for heavy trucks in 1999 was 15.10 cents per mile, according to the stipulated facts)

In-state carriers: 91.5% of miles =14,596,193.46
52% of savings = $197,728.87
savings per mile =1.4 cents/mile

(Exhibits 566, 567)

[12] Using Dr. Lawson's testimony that 2,000,000 miles were driven by out-of-state carriers and 13,000,000 miles were traveled by in-state carriers, and that out-of-state carriers received 31% of the savings; and applying these figures to the blended rate savings of $276,535.86 as calculated above, these are the calculations:

Out-of-state carriers: 2,000,000 miles
31% of the savings = $85,726.12
savings per mile (savings ÷ miles) = 4 cents/mile

In-state carriers: 13,000,000 miles
69% of the savings = $190,809.74

45. Using 1999 rates, trucks over 104,000 pounds accounted for 62% of the overall savings by flat fee sand and gravel and payers [*sic*]. Using 2000 rates, trucks over 104,000 pounds accounted for 99% of the overall savings by flat fee sand and gravel and payers [*sic*]. (Exhibit 564, testimony of Dr. Lawson).

46. The commodities eligible to pay flat fee rates in Oregon are commodities that typically would be hauled short distances -- intrastate or regionally. This is because of the relative low value of the commodities and their general availability. A typical log hauling trip would be 60-80 miles, with 35 trips made in a day. A typical general commodity haul would be 2,500-3,000 miles. (Testimony of Martin Labbe, Lloyd Ludtke, Berry Mammano, and Dr. Langenfeld).

47. Plaintiff Mansigh's business is based mostly on long-standing relationships with his customers. Mr. Mansigh has lost no Oregon business to any competitor in the last three years, nor has he lost any business to the one competitor he can think of who uses Oregon's flat fee option. Despite calculations indicating that Mr. Mansigh could reduce his taxes significantly by concentrating his business in Oregon and taking advantage of the flat fee system (Exhibit 101), Mr. Mansigh has not done so. (Testimony of Kenneth Mansigh).

48. Mr. Bredeson was also unaware of losing any business to a competitor who used Oregon's flat fee tax system. (Testimony of Mr. Bredeson).

49. No witnesses testified that they had lost any business to in [*sic*] Oregon competitor using the Oregon flat fee system. No witnesses testified that they had cho-

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savings per mile =1.5 cents/mile

sen to concentrate their trucking business in Oregon in order to take advantage of the flat fee system. No Oregon-based truckers testified that they had avoided out-of-state business in order to increase their in-Oregon miles and maximize their benefit under the flat fee tax system.

50. Mr. Mammano, an Oregon-based log carrier who uses the flat fee tax system, has never turned down a job because it required out-of-state travel. In order to stay in business, Mr. Mammano will haul logs to whatever destination the shipper requests. Mr. Mammano is president of the Oregon Forest Products Trucking Association (OFPTA), an industry association comprised mostly of log carriers. Most OFPTA members pay flat fee taxes. Mr. Mammano is unaware of any OFPTA member turning down a job that required hauling out-of-state, except perhaps where the member was not licensed to operate in the other state. (Testimony of Berry Mammano).

51. In 1999, Idaho changed its system of truck taxation from one in which log trucks were taxed approximately 50% less than general commodities (approximately a 2.5 to 3 cent per mile difference) to one in which trucks pay a weight-based registration tax and a fuel tax. Since the change, Idaho has seen little if any increase in competition for log hauling business and no entry of general commodity haulers into log hauling. (Testimony of Dr. Casavant).

52. If carriers wanted to take advantage of Oregon's flat fee rates, but some of their fleet hauled non-flat fee commodities, they could establish separate fleets or corporate subsidiaries in order to do so. (Testimony of Greg Dal Ponte and Dr. Langenfeld).

53. Swift is a large trucking company that operates throughout the United States and into Canada and

Mexico. Swift has a facility in Oregon with approximately 400 trucks there. Drivers and mechanics for the Oregon facility are recruited locally. Swift does not haul logs in Oregon. (Testimony of David Berry)[.]

54. General commodity carriers such as Swift, who have a significant presence in Oregon, would likely create a division or subsidiary to haul logs in Oregon if the tax structure were favorable enough to make that a profitable business opportunity. The fact that they have not done so suggests that the tax differential is not enough to make logs a profitable business opportunity for them. (Testimony of Dr. Langenfeld, Mr. Labbe).

55. The small size of the tax advantage enjoyed by flat fee taxpayers and the uncertainty of actually achieving a tax benefit by electing the flat fee option (truckers for the most part cannot be certain that they will run enough Oregon taxable miles to obtain a tax benefit under the flat fee option at the time the flat fee election must be made) make it unlikely that the flat fee option changes business decisions of truckers. (Testimony of Dr. Casavant).

Revenue Effect on State if Flat Fees Were Removed

56. Flat fee taxes account for approximately 11 million dollars in annual revenue to the state, whereas weight-mile taxes account for approximately 215 million. (Testimony of Mr. Dal Ponte).

57. Enforcement of the weight-mile tax against carriers who haul flat fee commodities would create a significant cost for the state. More auditors would be needed. In addition, most general commodity carriers travel on major routes such as I-5, where ODOT maintains weigh stations. Flat fee commodity carri-

ers travel extensively on lesser-used state highways and local routes where ODOT does not have weight stations and it could not cost-effectively deploy them. The cost of obtaining a reading at a weigh station on the interstate is approximately 50 cents per vehicle. The cost of obtaining a reading using portable scales is $22.00 per vehicle. (Testimony of Mr. Dal Ponte, Dr. Casavant).

58. The cost of conducting the flat fee studies is in the neighborhood of $10,000.00. (Testimony of Mr. Dal Ponte). The cost of enforcing and auditing the weight-mile tax against flat fee taxpayers could exceed the revenue that would be gained from elimination of the flat fee taxes. (Testimony of Dr. Casavant).

Miscellaneous

59. Mr. Russell testified on behalf of plaintiffs. In his direct testimony, Mr. Russell presented Exhibit 86 as an example of a company which achieved a significant tax savings under Oregon's flat fee system. However, on cross exam it was revealed that the underlying records for this company showed that one truck had traveled 712,602 taxable miles in a year. This would require the truck to have traveled over 81 miles per hour, 24 hours a day and 365 days of the year. Not only is it obvious from that calculation that the mileage listed for this truck was in error, but the computer consultant who provided the data to Mr. Russell gave him a note indicating that the mileage figure for this particular truck was at least 10 if not 100 times too high. Mr. Russell was unable to provide any convincing explanation as to why he used this carrier as an example despite the obvious error in the data, and the warning from his own consultant. I can only conclude that, at best, Mr. Russell demon-

strated a reckless disregard for the accuracy of the information he presented to the court, and, at worst, he deliberately attempted to deceive the court. Either conclusion is sufficient for me to find his testimony unreliable, and I therefore disregard Mr. Russell's testimony in its entirety. (Testimony of Mr. Russell, Exhibits 86, 544, 545).

CONCLUSIONS OF LAW

Plaintiffs allege that the farm truck exemption and the flat fee taxes violate both the Commerce Clause and the Equal Protection Clause.

I. COMMERCE CLAUSE ANALYSIS

Before a claim can be made that a tax is discriminatory under the Interstate Commerce Clause, the entities who are taxed differently must be "similarly situated." *General Motors Corp. v. Tracy*, 519 US 278, 298, 299,117 S Ct 811, 824 (1997). Therefore, I first consider defendants' arguments that plaintiffs are not similarly situated with flat fee and farm carriers.

A. FARMERS ARE NOT SIMILARLY SITUATED WITH TRUCKERS FOR COMMERCE CLAUSE PURPOSES

While the plaintiffs argue that *any* actual or prospective competition between the entities in dispute is sufficient to consider them similarly situated under the Commerce Clause, *GM v. Tracy* expressly holds to the contrary. The court in *GM* recognized that there was some potential competition between sellers of bundled and unbundled natural gas. *Id.*, 519 US at 303, 117 S Ct at 826. Nevertheless, the court held that these entities should not be considered similarly situated for Commerce Clause purposes. *Id.*, 519 US at 310, 117 S Ct at 829.

Neither *GM* nor *Alaska v. Arctic Maid*[13], the other case addressing the "similarly situated" issue, sets forth a test for determining whether entities are similarly situated for Commerce Clause purposes. In *Alaska*, the court focused on the different functions performed by the entities - the out-of-state freezer ships did not freeze fish to sell frozen, but rather to preserve the fish for transport to canneries. Thus, the freezer ships competed not with local dealers who retailed frozen fish, but with local canners. *Id.*, 366 US at 204, 81 S Ct at 932. In *GM*, the court gave weight to the limited competition between the entities and also the state's interest in protecting the small residential consumers served by the local distribution companies. *GM*, *supra*, 519 US at 303-310, 117 S Ct at 826-829.

On the facts of this case, I find that farmers and truckers are not similarly situated for Commerce Clause purposes. The exemption to the weight-mile tax is granted to entities which own or operate farms, and only for farm-related purposes. If a vehicle otherwise eligible for the exemption is used to haul non-eligible commodities, the vehicle must pay weight-mile tax for those miles. No plaintiffs own or operate farms. No plaintiffs grow or sell crops. While trucking is 100% of plaintiffs' business, there was no evidence that trucking was anything more than a small part of the business of farmers. While both farmers and truckers can haul non-eligible commodities, they both must pay weight-mile tax when they do so, and thus are treated the same.

Companies whose main business was selling fish were found not to be similarly situated in *Alaska v. Arctic Maid*. Companies which supplied natural gas were found to be not similarly situated in *GM*. Here, farmers and truckers are engaged in much more different businesses, with the only overlap being the transportation of the farmers' products. This is

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[13] *Alaska v. Arctic Maid*, 366 US 199, 81 S Ct 929 (1961)[.]

a marginal level of competition consistent with that found to be insufficient to outweigh other concerns in *GM*. And, like in *GM*, there are important state interests at stake, namely, protection of agriculture. Indeed, protection of agriculture has been recognized by Congress as important, and farm vehicles are substantially exempted from federal highway taxes.

B. PLAINTIFFS ARE SIMILARLY SITUATED WITH FLAT-FEE TAXPAYERS

Defendants argue that plaintiffs are not similarly situated with flat fee taxpayers; that is, carriers who are eligible to pay their taxes on a flat fee basis because they haul wood chips, sand and gravel, or logs. The first problem with defendants' argument is that it does not dispose of all plaintiffs. Plaintiff Kenneth E. Mansigh Trucking, Inc., is a Washington-based log carrier who is without question similarly situated to flat fee taxpayers in that he hauls the commodities eligible for flat fee treatment.

Again applying the principles of *Alaska v. Arctic Maid* and *GM*, I conclude that haulers of flat fee commodities and general commodities are similarly situated for Commerce Clause purposes. I agree with defendants that the overlap between these markets is small. By and large, most log haulers haul logs and most general commodity haulers haul general commodities. Nevertheless, the evidence does show an increasing trend for carriers to diversify. There are no regulatory barriers to prevent a carrier from carrying both general commodities and flat fee commodities. Equipment is increasingly designed to be versatile so that it can handle different types of commodities. Economic pressures are pushing carriers to diversify their business. A survey of Oregon carriers by the state's expert showed significant overlap between flat fee and general commodities carriers. On this record, I find enough actual and prospective competition to determine that carriers of flat fee commodities are similarly situated to carriers of general commodities.

C. BASIC STANDARD FOR COMMERCE CLAUSE ANALYSIS OF TAX PROVISIONS

A tax will survive a commerce clause challenge "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc.[] v. Brady*, 430 US 274, 279, 97 S Ct 1076, 1079 (1977); see also *Amerada Hess v. Director of Taxation of New Jersey*, 490 US 66, 72, 109 S Ct 1617, 1621 (1989). Plaintiffs' arguments focus on discrimination against interstate commerce and apportionment. Plaintiffs do not contend that the flat fee options are facially discriminatory, nor could they, since both in-state and out-of-[s]tate carriers can and do use the flat fee options. Eligibility for the flat fee tax rates is determined solely by the commodities hauled, not the location of the carriers.

D. OREGON'S TRUCK TAX SYSTEM DOES NOT INTENTIONALLY DISCRIMINATE AGAINST OUT-OF-STATE CARRIERS

Plaintiffs' weakest argument is that the availability of a flat fee option intentionally discriminates against interstate commerce. See *Bacchus Imports v. Dias*, 468 US 263, 104 S Ct 3049 (1984) (exemption from excise tax for locally-produced liquor found to be unconstitutional discrimination against interstate commerce where legislature expressly stated the purpose of the exemption was to aid local industry).

Certainly there is no direct evidence of intentional discrimination in this case. There was no evidence of any statement by any legislator at any time of an intent to advantage Oregon trucking companies compared to interstate trucking companies by making the flat fee tax available.

Plaintiffs argue that a discriminatory intent should be inferred because the legislature, despite having studies indicating a discriminatory effect, failed to correct the situation. This argument is unpersuasive for several reasons. First, the 1997 study which plaintiffs contend shows a discriminatory effect was never even presented to the legislature due to disputes as to its validity. Second, the 1999 Legislature did not ignore the studies, but rather reduced the weight-mile tax by approximately 12% (see Statement of Stipulated Facts). Third, the studies presented to the legislature analyzed the difference between flat fee and weight-mile taxpayers. There was no evidence that those studies contained any analysis of in-state versus out-of-state carriers.

In 2001, the legislature heard testimony that the flat fee studies were unreliable and that the legislature would be justified in not changing rates based on those studies. Plaintiffs argue that the hearing at which this testimony was presented was a sham orchestrated for purposes of this lawsuit, but if that is the case, there is no evidence that any legislators were involved in or aware of the "sham" nature of the hearing. There was no evidence to indicate that the legislators did not rely on the testimony received at this hearing in good faith. Moreover, the results of Dr. Casavant and Lawson's studies indicate that the testimony heard by the legislature was correct. Projecting forward from the change in the weight-mile rate that went into effect in September of 2000, if that rate were applied to all of the log truck miles in 2000[14], the underpayment for logs is reduced to $484,690.33. Divided by the 86,596,752 miles traveled, this results in an average underpayment of 6/10 of a cent per mile. In other words, the effect of the rate changes that went into effect in September 2000 could not have been fully understood at the time the legislature met in 2001. Thus, the legislature's failure to

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[14] [U]sing the assumptions described above, and using 2000 mileage because 2001 was unavailable[.]

change rates in 2001 can hardly lead to an inference of discriminatory intent.

Finally, approximately 88% of Oregon-based trucking companies pay the weight-mile taxes which plaintiffs contend are disadvantageous. If indeed Oregon's legislators were motivated by a discriminatory intent to aid Oregon trucking companies, there is no explanation for why they would do so by disadvantaging 88% of Oregon trucking companies.

E. OREGON'S FLAT FEE TAXES DO NOT DISCRIMINATE IN PRACTICAL EFFECT AGAINST INTERSTATE COMMERCE

Is well-established that even a tax which is facially nondiscriminatory and unmotivated by discriminatory intent may still violate the Commerce Clause if it "has the effect of unduly burdening interstate commerce." *Amerada Hess*, *supra*, 490 US at 75, 109 S Ct 1617 at 1623.

1. Standard for Practical Effect Discrimination

Plaintiffs have argued that any effect on interstate commerce is prohibited by the Commerce Clause, and that the court has no authority to weigh the impact on interstate commerce against the purpose of the regulation. However, the cases relied on by plaintiffs for this proposition are all cases involving intentionally or facially discriminatory taxes. In *Bacchus*, *supra*, the legislature expressly stated its intent to assist local industry. *Associated Industries of Missouri v. Lohman*, also cited by plaintiffs, involved a facially discriminatory tax imposed only on goods which were purchased out of the state and brought into the state. *Associated Industries of Missouri v. Lohman*, 511 US 641, 114 S Ct 1815; see 511 US at 647, 114 S Ct at 1820, 1821 (1994). Similarly, *Maryland v. Louisiana* involved a facially discriminatory tax that imposed a "first use" tax on gas piped into the state, but then exempted gas which was to be actually used in the state as

opposed to shipped on to interstate destinations. *Maryland v. Louisiana*, 451 US 725, 757,101 S Ct 2114, 2134 (1981). And *Fulton Corp. v. Faulkner* involved a facially discriminatory tax in which residents paid no tax on their holdings in corporations that did business entirely with the state, but paid the full tax rate for their holdings in corporations that did business entirely outside the state. *Fulton Corp. v. Faulkner*, 516 US 325, 328, 116 S Ct 848, 852 (1996).

In contrast, cases discussing taxes which do not intentionally or facially discriminate against interstate commerce appear to apply a more flexible standard. The standard was set forth in *Pike v. Church* [*sic*]:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [citation omitted].
>
> *Pike v. Church* [*sic*], 397 US 137, 142, 90 S. Ct. 844, 847 (1970)

While the composition and philosophy of the Supreme Court has undoubtedly changed since the *Pike* decision, *Pike* has not been overruled and it is logically distinguishable from cases concerning facially or intentionally discriminatory statutes. Moreover, it was cited with approval in the 1994 case *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, specifically with regard to its holding that nondiscriminatory regulations which have incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Oregon Waste Systems, Inc. v. Depart-*

ment of Environmental Quality, 511 US 93, 99, 114 S Ct 1345, 1350 (1994), quoting *Pike*, *supra*. In *Oregon Waste Systems*, the statute involved was facially discriminatory. It imposed a surcharge on disposal of solid waste generated out-of-state which did not apply to solid waste generated in-state. The court expressly identified that facial discrimination as the reason it did not apply the *Pike* balancing test in that case. *Id.*, 511 US at 100, 101, 114 S Ct at 1351.

I therefore conclude that plaintiffs must prove more than any effect whatsoever on interstate commerce. They must prove an "undue burden" on interstate commerce. *Amerada Hess*, *supra*. If the effects on interstate commerce are incidental, then under the *Pike* test, plaintiffs must prove that the burden on interstate commerce is clearly excessive in relation to the putative local benefits.

2. *The Effect of Oregon's Flat Fee Tax on Interstate Commerce Is Incidental and Not Excessive in Relation to Local Benefits from the Tax*

The gist of plaintiffs' argument regarding discrimination is as follows: the flat fee taxpayers are mostly Oregon-based; flat fee taxpayers pay a lower rate than weight-mile taxpayers; therefore, Oregon-based taxpayers enjoy a tax break compared to out-of-state carriers.

With regard to wood chip carriers who pay under the flat fee, the evidence is clear that they pay a higher rate than the weight-mile taxpayers. Therefore, the flat fee tax disadvantages, if anyone, in-state commerce rather than interstate commerce.

With regard to sand and gravel carriers and log carriers, I have found that they did enjoy a slightly lower average tax rate than weight-mile carriers. In the year 2000, I found that sand and gravel carriers on average paid 1.9 cents per mile less than they would have paid under the weight-mile tax,

and log carriers paid on average 1.34 cents per mile less than they would have paid under the weight-mile tax. I cannot agree with defendants that these differences are "revenue neutral" in light of the average profit margin in the industry being three cents per mile.

On the other hand, plaintiffs exaggerate the difference, arguing that some flat fee taxpayers save considerably more than the average. This is true, but plaintiffs fail to mention that the evidence also shows that some flat fee taxpayers actually pay more than they would pay under the weight-mile tax.

Moreover, the delineation between in-state and out-of-state taxpayers is not as simple as plaintiffs would have it. While it is true that most flat fee taxpayers are Oregon-based and most out-of-state carriers pay weight-mile tax, it is also true that 88% of Oregon carriers pay weight-mile tax. In *Goldberg v. Sweet*, the court found it significant in rejecting an argument that an Illinois tax on phone calls discriminated against interstate commerce that the burden fell heavily on Illinois taxpayers who presumably could participate in the Illinois political process. The court noted that "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Goldberg v. Sweet*, 488 US 252, 266,109 S Ct 582, 591 (1989).[15] Here, if indeed the flat fee

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[15] On this issue as well plaintiffs cite a case involving a facially discriminatory statute. Plaintiffs cite *New Enemy Co. of Indiana v. Limbach* for the proposition that it does not matter if out-of-state businesses do not suffer and in-state businesses do. However, the statute in *New Energy Company* was a facially discriminatory statute that granted a tax credit to ethanol produced in Ohio or in a state that granted a reciprocal credit to Ohio-produced ethanol, Indeed, the portion of the opinion cited by plaintiffs begins with: "where discrimination is patent." *New Energy Co. of Indiana v. Limbach*, 486 US 269, 276, 108 S Ct 1803, 1809. In this case, discrimination is not "patent". The statute does not on its face favor

alternative disadvantaged weight-mile taxpayers, one would assume that the 88% of Oregon carriers who pay weight-mile tax would have some impact on the political process. Not only that, but some out-of-state carriers pay the flat fee tax. Indeed, as will be discussed shortly, out-of-state carriers derive a substantially disproportionate benefit from the sand and gravel flat fee option. When it comes right down to it, plaintiffs have presented *no* evidence of the difference, if any, between the actual taxes paid by in-state and out-of-state carriers. They have simply attempted to use the difference between weight-mile and flat fee payers as a proxy for out-of-state and in-state carriers.

The ultimate question is whether the tax structure in any way disadvantages interstate commerce. I cannot find that it does.

With regard to sand and gravel, I find it highly significant that out-of-state taxpayers enjoy a vastly disproportionate share of the tax benefit. In 1999, out-of-state taxpayers saved an average of 13.5 cents per mile using the flat tax, whereas in-state taxpayers only saved an average of 1.4 cents per mile. In 2000, out-of-state taxpayers save an average of 4 cents per mile, whereas in-state taxpayers only saved an average of 1.5 cents per mile. In the face of those figures, it is very difficult to conclude that out-of-state trucking companies have been damaged by the availability of the flat fee option.

Moreover, evidence that would indicate that interstate commerce has been damaged was completely lacking. There was no evidence of a single out-of-state carrier losing a single customer to a carrier taking advantage of the flat fee rates. Indeed, Mr. Mansigh, while speculating that he was at

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in-state interests, nor is there any evidence of the discriminatory intent behind the statute.

a hypothetical competitive disadvantage, testified that he had not lost a single Oregon customer in the last three years to anyone. There was no evidence of a single out-of-state carrier establishing a fleet or subsidiary in Oregon to take advantage of the flat fee rates. Even out-of-state carriers who already had a significant presence in Oregon, such as Swift, made no effort to establish a fleet or subsidiary to take advantage of flat-fee rates. Despite plaintiffs' chart indicating that Mansigh could save significant money by concentrating its operations in Oregon to take advantage of the flat fee taxes, there was no indication that Mansigh had made any effort to do so or intended to. Likewise, there was no evidence of a single in-state carrier refusing to take a load out-of-state in order to concentrate its miles in Oregon.

In addition, the evidence showed that in Idaho, where a substantially greater disparity in tax rates between commodities similar to Oregon's flat fee commodities and general commodities was eliminated, the trucking market has not changed.

Rather, the evidence indicated that several factors were significantly more important to where trucking companies operate than Oregon's tax structure. First, the evidence was clear that truckers will go where the business is. Second, at least for smaller companies like Mansigh, much of that business is developed through long-term personal relationships, having nothing to with tax rates. Third, the evidence was also unanimous that commodities like logs and sand and gravel will virtually always be hauled for short distances only, because it is not economically viable to haul them long distances. Thus, these commodities will be carried for the most part by in-state haulers regardless of the tax structure.

The court in *Amerada* noted that:

> Denying a deduction for windfall profit tax payments cannot create oil reserves where none exist and therefore cannot be considered an incentive for

> oil producers to move their oil-producing activities to New Jersey.
>
> *Amerada*, *supra*, 490 US at 78,109 S Ct at 1617.

Similarly, a change in Oregon's tax structure would not change the facts that most of Mr. Mansigh's long-standing customers are in Washington, and most of Mr. Mammano's are in Oregon. Nor would it change the fact that each of these truckers is more than willing to travel to the other state when they have business there.

Considering the record as a whole, I cannot find that the availability of the flat fee option for certain commodities creates an undue burden on interstate commerce. If there is any effect at all from the small rate difference, it is incidental. Applying the *Pike* test, it is clear that, regardless of any benefit to taxpayers, the flat fee option creates a significant benefit to the state. Removing the flat fee option would impose significant additional costs on the state in order to enforce a universal weight-mile tax. Additional auditors would be needed, and additional data, in the form of weigh stations placed on remote, lightly-traveled roads, would also be needed. Any incidental effect which might be created by the tax structure is outweighed by the state's interest in efficient and cost-effective tax enforcement, particularly considering the flat fee revenue only amounts to approximately 5% of the revenue collected by the state from weight-mile taxpayers.

F. OREGON'S TRUCK TAX SYSTEM IS FAIRLY APPORTIONED

Determining whether Oregon's truck tax system is fairly apportioned poses an interesting problem. It is established that a flat tax is unapportioned. *ATA v. Scheiner*, 483 US 266, 284, 107 S Ct 2829, 2840 (1987). It is equally established that a tax based on the number of miles traveled by a truck, such as the weight-mile tax, is properly apportioned. *Goldberg*, *supra*, 488 US at 264, 109 S Ct at 590. This case

presents the question of whether a tax system that permits some taxpayers, whether based in-state or out-of-state, to voluntarily choose to pay an unapportioned flat tax, while permitting all taxpayers to pay an apportioned tax if they prefer, violates the Commerce Clause.

Simply on the face of the question, I am inclined to say no. It seems that the evil of the flat tax in *Scheiner* was that any trucker traveling through the state was forced to pay the unapportioned tax. It is difficult to conceptualize how a tax system which permits every taxpayer to choose to pay an apportioned tax could violate the apportionment requirement.

Nevertheless, I will analyze the apportionment issue using the traditional method: asking whether the tax is internally consistent and externally consistent. *Goldberg*, *supra*, 488 US at 261, 109 S Ct at 589; see also *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 US 175, 185, 115 S Ct 1331, 1338 (1995).

1. Oregon's Truck Tax System Is Internally Consistent

"To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg*, *supra*, 488 US at 261, 109 S Ct at 589. A more expansive version of the test was set forward in *Oklahoma Tax Commission*: "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Oklahoma Tax Commission*, *supra*, 514 US at 185, 115 S Ct at 1338.

First, there is no risk of multiple taxation if every state were to adopt a truck tax system like Oregon's. Nothing in either Oregon's weight-mile tax or its flat fee tax reaches mileage run in another state.

Second, there is no burden on interstate commerce that intrastate commerce would not also bear. As discussed in detail above, with regard to wood chips, the flat fee taxpayers actually pay a higher tax. With regard to sand and gravel, interstate trucking companies receive a disproportionate share of the tax savings. Overall, some interstate carriers receive an advantage from the flat fee taxes, the vast majority of Oregon's carriers pay the supposedly disadvantageous weight-mile tax, and some Oregon carriers paying flat fee taxes pay more than they would pay under the weight-mile formula. Finally, as discussed in my analysis of whether the tax structure has a discriminatory effect, I have simply seen no evidence that interstate commerce has been disadvantaged or negatively affected by Oregon's truck tax system. Nor have I seen any indication of truckers concentrating their mileage in Oregon in order to take advantage of the flat fee rates.

Moreover, as discussed above, plaintiffs' own evidence demonstrates that the flat fee commodities will always be mostly hauled by in-state carriers, regardless of the tax structure, because it is not economically feasible to haul them long distances. The proposition that, but for Oregon's flat fee system, interstate truckers would be hauling logs across the nation simply does not comport with the facts of this case.

2. Discussion of Plaintiffs Internal Consistency Analysis

Plaintiffs argue that Oregon's system fails the internal consistency test because if every state employed an identical system, a sand and gravel carrier would achieve significant tax savings by concentrating its mileage in Oregon instead of operating in interstate commerce. However, the data regarding sand and gravel carriers interestingly shows that the greatest tax savings was *not* achieved by the group who ran the most miles in Oregon. Indeed, in 1999, while running

only 8.5 percent of the sand and gravel miles, out-of-state carriers saved nearly ten times as much per mile as the in-state carriers who ran the vast majority of the miles. In 2000, out-of-state carriers running 31 percent of the sand and gravel miles saved nearly three times as much per mile as in-state carriers who ran the majority of the miles. At least with respect to sand and gravel, it appears that the key to maximizing savings under the flat fee system is to run a heavy truck, not to run a large number of miles in Oregon.

If we were to apply plaintiffs' argument to a log truck, it clearly overestimates what the weight-mile tax would be (and therefore the disparity, if any, between the truck running all its miles in Oregon compared to the truck running its miles interstate), because it assumes that all weight-mile taxes are paid at the 80,000 pound rate. This means that the log truck would have to run loaded for all miles, when in fact the evidence is that log trucks run 55% of their miles empty and therefore pay a lower weight-mile rate for those miles.

Finally, even if an 80,000 pound truck could be affected as plaintiffs allege, the effect on interstate commerce cannot be determined by analyzing only one truck or class of trucks. In order to determine the net effect on interstate commerce, one must analyze how the tax works overall, taking into account its various different effects.

3. Discussion of Cases Cited by Plaintiffs

Plaintiffs rely heavily on two cases for their argument that Oregon's truck tax system fails the internal consistency test.

The first of these is *Scheiner*, *supra*. I do not find *Scheiner* persuasive in this case. First, it is clear that it was of great importance in *Scheiner* that there was no alternative to the flat tax. Indeed, the court stated: "If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that

commerce among the States would be deterred." *Scheiner*, *supra*, 483 US at 284, 107 S Ct at 2840. In this case, Oregon does not require a flat fee as the price of entry into the state. Any trucker can choose to pay the weight-mile tax instead.

In addition, in *Scheiner*, the flat fee resulted in out-of-state trucks paying a per-mile tax rate approximately five times as heavy as that paid by in-state businesses. The court found this difference "exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.*, 483 US at 286, 287,107 S Ct 2841, 2842. Here, the difference between weight-mile and flat fee taxpayers is approximately 15%, not 500%. Moreover, as discussed above, the difference between weight-mile and flat fee taxpayers does not indicate the difference between in-state and out-of-state taxpayers. Furthermore, there is simply no evidence that Oregon's truck tax system exerts a "hydraulic pressure" on truckers to ply their trade in Oregon as opposed to in interstate commerce.

Finally, even *Scheiner* recognized that a flat tax could still be permissible where it was the only practicable means of collecting revenues and "the use of a more finely gradated user-fee schedule would pose genuine administrative burdens." *Id.*, 483 US at 296, 107 S Ct 2847. In this case, I cannot say that the flat tax is the *only* practicable means of collecting revenues, since Oregon does collect weight-mile taxes from haulers who would be eligible for flat fee but elect weight-mile. But I do not read *Scheiner* to prohibit a flat tax *alternative* when the existence of that alternative results in substantial cost savings to the state and its elimination would pose genuine administrative burdens.

An additional case which plaintiffs contend it is "on all fours" with this case is *ATA v. Gray*. In that case, Arkansas offered truckers three options: an annual flat fee, a mileage fee of five cents per mile, or a trip permit. The evidence was

that out-of-state trucks paid 370% more than in-state trucks. *ATA v. Gray*, 288 Ark 488, 494, 707 SW2d 759, 761. The Arkansas Supreme Court upheld the tax against Commerce Clause challenges. *Id.* The merits of the case never reached the U.S. Supreme Court. However, one justice, ruling on an application for an injunction, concluded that the plaintiffs were likely to prevail in their contention that the tax was unconstitutional. Noting that the out-of-state taxpayers paid a rate more than three times higher than instate taxpayers, the Justice ruling on the injunction stated that the effect of the tax was substantially similar to that in *Scheiner*. *ATA v. Gray*, 483 US 1306, 1308, 108 S Ct 2, 3 (1987).

First, the opinion of one Justice ruling on a motion for preliminary injunction does not constitute a binding Supreme Court precedent regarding the merits of the case. Second, the evidence in *Gray*, like the evidence in *Scheiner*, showed out-of-state taxpayers paying several times more than in-state taxpayers. As discussed in my analysis of the *Scheiner* case, those facts present an entirely different scenario than the evidence in this case.

For all these reasons, I find that Oregon's truck tax system passes the internal consistency test.

4. Oregon's Truck Tax System Is Externally Consistent

"The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, *supra*, 488 US at 262,109 S Ct at 589.

Here, I do not understand plaintiffs to have made any contention that Oregon's system somehow taxes out-of-state activity. I can see no evidence that it does, and therefore find that Oregon's truck tax system is externally consistent.

Because I find that Oregon's truck tax system is both internally and externally consistent, I find that it is properly apportioned. I have found that Oregon's truck tax system passes the *Complete Auto* test, and therefore I turn my attention to plaintiffs' equal protection argument.

II. OREGON'S TRUCK TAX SYSTEM DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

A. THE FARM EXEMPTION DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Because this case does not involve a fundamental right or a suspect class, the tax will "survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Kadrmas v. Dickinson Public Schools*, 487 US 450, 457, 458, 108 S Ct 2481, 2487 (1988). Protection of agriculture is a legitimate governmental purpose; one which is promoted by [the] federal government in addition to Oregon's exemption for farm trucks. The exemption for farm trucks is rationally related to that purpose.

B. OREGON'S FLAT FEE TAXES DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE

First, the *Complete Auto* test under the commerce clause encompasses due process standards. *Amerada Hess*, *supra*, 490 US at 79, 80, 109 S Ct at 1625. Having found that Oregon's flat fee taxes do not violate the Commerce Clause under the *Complete Auto* test, I also find that they do not violate equal protection. *Id.*

Moreover, I find that the flat fee taxes are rationally related to a legitimate government purpose. As discussed above, the flat fee taxes save Oregon substantial administrative costs which would be imposed if they were removed.

That is a sufficient basis for an economic regulation to pass an equal protection challenge.

CONCLUSION

Plaintiffs raised issues which, as a matter of public policy, certainly concern this court. My conclusion is based on the specific facts that were proven at trial. Changes in the flat fee or the weight-mile rates could result in a different situation, leaving open the unfortunate possibility that Oregon's tax structure will need to be litigated again in the future. Moreover, the lack of accurate recordkeeping by the flat fee taxpayers will continue to make analysis of the true impact of the flat fee tax a complicated endeavor. Nevertheless, my obligation is to decide this case based on the facts before me and the law, not on my personal view of what would make good public policy. The plaintiffs have the burden of proof, and I have been unable to find sufficient evidence in the record to justify finding Oregon's truck tax system unconstitutional. Defendants should submit an appropriate judgment.

Once again I thank all counsel for their professional and diligent work on this case.

Sincerely,

Claudia M. Burton
Circuit Court Judge Pro Tem

(3)

Supreme Court, U.S.
FILED
JUN 5 - 2006
OFFICE OF THE CLERK

No. 05-1177

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,

Petitioners,

v.

STATE OF OREGON, DEPARTMENT OF TRANSPORTATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF AAA OREGON/IDAHO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether optional flat fee alternatives provided by the State of Oregon for trucks carrying specific commodities cause Oregon's heavy truck tax system to violate the dormant Commerce Clause of the United States Constitution when the State uses a weight-mile tax as its default tax.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Supreme Court of Oregon were petitioners American Trucking Associations, Inc.; CRST, Inc.; USF Reddaway, Inc.; Kenneth E. Mansigh Trucking, Inc.; Veneer Chip Transport, Inc; and respondents State of Oregon, Department of Transportation; Grace Crunican, in her capacity as Director of the Oregon Department of Transportation; and AAA Oregon/Idaho.

Respondent AAA Oregon/Idaho has no parent Corporation, and there is no publicly held company owning 10% or more of its stock.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Besides the provisions noted by petitioners, Section 825.474 of the Oregon Revised Statutes provides in pertinent part:

> 1. In addition to other fees and taxes imposed by law upon carriers, there shall be assessed against and collected from every carrier a tax for the use of the highways to apply to the cost of administration of this chapter and for the maintenance, operation, construction and reconstruction of public highways.
>
> 2. The tax rate which shall apply to each motor vehicle shall be based upon the declared combined weight of the motor vehicle and in accordance with the weight group tax rates shown in the tables set forth in ORS 825.476.
>
> * * *

The carrier tax tables that applied for the period January 1 through August 31, 2000, and the revised carrier tax tables that applied for the period September 1 through December 31, 2000, as set forth in Section 825.476 of the Oregon Revised Statutes, are provided in the attached Appendix B. App., *infra*, 1b-2b.

STATEMENT OF THE CASE

American Trucking Associations, Inc. (the "ATA") contends that this case involves a flat tax that, "in its pernicious effects," is just like the mandatory flat taxes the Court struck down in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987). Pet. at 2. The Oregon Supreme Court correctly recognized that this situation is nothing like the one in *Scheiner*.

Faithfully applying the Court's fair apportionment precedents from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) through *Goldberg v. Sweet*, 488 U.S. 252 (1989) and *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175 (1995), the Oregon Supreme Court drew the inescapable conclusion that Oregon does not tax more than its fair share of interstate commerce. Unlike the entry fees Pennsylvania imposed on interstate carriers in *Scheiner*, Oregon's optional flat fees do not erect a barrier at the State's borders. If all states followed Oregon's tax system, carriers would not be required to pay multiple entry fees for the privilege of operating in interstate commerce but instead would pay only for miles actually traveled in each state.

The Oregon Supreme Court also correctly applied the Court's discrimination precedents from *Associated Industries of Missouri v. Lohman*, 511 U.S. 641 (1984), through *Scheiner* and *American Trucking Ass'ns, Inc. v. Michigan Public Serv. Comm'n*, 545 U.S. 429, 125 S. Ct. 2419 (2005) in ruling that discrimination against interstate commerce is not presumed but instead must be proven in real dollars and cents. Not only did the ATA fail to prove that interstate carriers paid more per mile than Oregon haulers or otherwise suffered any practical burden as a result of the flat-fee option, but the record showed just the opposite. App., 18a-22a. The Oregon Supreme Court's straightforward and unremarkable application of the Court's Commerce Clause jurisprudence presents no occasion for further review.

1. Oregon generally taxes heavy trucks for their use of the State's highways through a weight-mile tax by which a carrier pays a rate for each mile that its trucks operate on the State's public highways. The rate is based on the vehicle's maximum legal weight. ORS § 825.474(2); App., 4a. The higher the declared weight, the higher the per mile tax. ORS § 885.476; App., 4a, *infra*, 1b-2b. Carriers must maintain records of each vehicle's declared weight and

miles traveled on public roads to calculate and correctly report taxes owed. App., 4a.

Oregon offers carriers of logs, sand and gravel, and wood chips the option to pay a flat fee in lieu of the weight-mile tax. ORS § 425.480(1), (4) and (5); App, 4a-5a. For each commodity, the legislature aims for revenue neutrality between the flat fee and the weight-mile tax. That is, the legislature sets the flat-fee amount prospectively to collect the identical revenue that a truck of the same weight would pay in weight-mile tax if it operated as many miles per year as the average truck carrying that commodity. App., 5a. The legislature has adjusted the relationship between the flat fee and the weight-mile tax a number of times, by changing the flat fee amount, the weight-mile rates, or both, to reflect changes in the average mileage since Oregon's adoption of the flat-fee options in 1949. Both Oregon and non-Oregon based carriers have elected to pay the optional flat fees. App., 5a.

2. Trucks carrying flat-fee eligible commodities are more likely than trucks carrying other commodities to use nonpublic (i.e., nontaxable) roads for significant portions of their trips, to use lesser-traveled public roads where the State does not have permanent weigh stations, and to make multiple short journeys. These factors make it more difficult for the carriers to keep the records that the weight-mile tax requires and for the State to enforce the tax. The purpose of the flat-fee option is to ease the burden on both the carriers and the State of administering and enforcing the highway use tax. App., 5a-6a. The cost to the State of doing away with the flat-fee options and enforcing and collecting the weight-mile tax against flat-fee taxpayers could exceed any additional revenue the State might gain in those years when flat-fee taxpayers underpay compared with what their tax liability would have been under the weight-mile tax. App., 58a–59a.

3. For the tax year 2000 at issue in the case, the ATA "presented *no* evidence of the difference, if any, between the actual taxes paid by in-state and out-of-state carriers." App., 69a (emphasis original). The only evidence the ATA even attempted to offer on point was the expert testimony of Robert Russell, who used one Oregon carrier as a purportedly representative example of a company that had achieved significant tax savings under the flat fee. The data for this company was grossly in error, and Mr. Russell had been warned by his computer consultant not to use it. The trial court concluded that Mr. Russell, at best, demonstrated a reckless disregard for the accuracy of his data and, at worst, deliberately attempted to mislead the court. The trial court therefore disregarded his testimony in its entirety. App., 59a–60a.

The only probative evidence was thus defendants' expert testimony. Using conservative assumptions that favored the ATA's position, defense experts Drs. Ken Casavant and Catherine Lawson showed that during 2000 flat-fee paying wood chip haulers overpaid by $27,315.75, while sand and gravel trucks electing the flat fee underpaid by $276,535.86 and flat-fee paying log carriers underpaid by $1,164,585.86. This means that, at best for the ATA, flat-fee haulers in some instances paid anywhere from 85% to 100% of what they would have paid under the weight-mile tax and in other instances paid more. App., 49a–52a.

While the majority of carriers electing the flat-fee options were Oregon-based, this fact alone does not determine whether in-state or out-of-state truckers bore the burden of any overpayment or enjoyed the benefit of any underpayment. Simply electing the flat-fee option in a year where there is an underpayment does not guarantee a tax savings to any individual carrier or in any particular amount. Because a carrier has to run more miles than the average to achieve tax savings, some flat-fee taxpayers save more than

the average, some save less, and some pay more than they would have paid under the weight-mile tax. *Id.*, 54a. Indeed, although out-of-state sand and gravel carriers represented only 3.5% of flat-fee electors and accounted for only 13.33% of the total flat-fee sand and gravel mileage, they realized 31% of the sand and gravel underpayment in 2000. *Id.* This means that out-of-state sand and gravel carriers electing the flat fee saved more than in-state carriers. *Id.* at 55a. The figures were similar for 1999, except out-of-state sand and gravel haulers saved even more than their in-state counterparts. *Id.*

4. The ATA also failed to prove any significant practical burden on interstate commerce. App., 22a. There was no evidence that any trucker, whether in-state or out-of-state, ever took the flat fee into account in deciding whether to haul, or avoid hauling, any commodity, whether flat-fee eligible or not, in Oregon or across Oregon's borders. There was no evidence that any out-of-state carrier has been harmed at all in competing for in-state hauls in Oregon or interstate hauls running through Oregon. There was no evidence that any carrier ran more miles or fewer miles in Oregon because of the flat fee. App., 56a-58a. The evidence was all to the contrary. Neither in-state nor out-of-state carriers consider the flat fee in deciding whether or where to haul commodities of any kind, whether flat-fee eligible or not. *Id.*, 56a-57a. Truckers go where the business is; they travel where the shipper requests. *Id.* In particular, flat-fee eligible carriers have developed their business through longstanding relationships that they would not risk by declining a job. *Id.*, 56a-57a, 70a-71a.

Moreover, roughly 88% of Oregon haulers pay the same weight-mile tax that the truckers represented by the ATA pay and would have the ability to seek a legislative solution if the flat-fee options presented any problem. *Id.*, 68a-69a. There is no such problem. Over the years, flat-fee

studies conducted by the State have shown that the flat-fee rates have done a good job of approximating weight-mile rates, marginally overcharging flat-fee payers in the aggregate through 1995. (SER 19.) Without complaint for over 50 years until the ATA brought this case, the flat fees served their valid purpose of providing a revenue-neutral alternative to the weight-mile tax that significantly reduces the administrative burdens on both the taxpayers and the State. App., 58a-59a.

REASONS FOR DENYING THE PETITION

A. The Oregon Supreme Court's ruling poses no conflict with rulings by other courts or this Court.

The ATA seeks to entice the Court into granting this petition by manufacturing a conflict among the lower courts. The ATA says that the Oregon Supreme Court's holding that discrimination must be proven in real dollars and cents somehow conflicts with rulings by other state supreme courts and federal courts of appeal. There is no such conflict.

First, the ATA's cases are all distinguishable because they involved mandatory flat taxes that imposed entry fees at the state's borders for all participants. The complaining out-of-state parties all paid the same flat fees as their in-state counterparts for the privilege of operating in the state.

Oregon requires no one to pay a flat fee for the privilege of running on its public roads. No carrier represented by the ATA pays the flat fee. They are all weight-mile taxpayers who pay only for actual miles driven on Oregon public roads. This distinction makes a difference. This case does not present the same contrast that existed in *Scheiner* between in-state and out-of-state carriers. There, the carriers all were required to pay the same fee for the nominally identical privilege of driving as many miles as they wanted on the state's roads, but the privilege was likely to be more valuable to in-state carriers. Here, there is no